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OPTICAL GOODS



Investigation into an Alleged Combine
in the Manufacture and Sale of
Optical Goods in Canada



REPORT OF COMMISSIONER, COMBINES INVESTIGATION ACT
DEPARTMENT OF JUSTICE
OTTAWA, APRIL 24, 1948

Price, 25 cents

OTTAWA
EDMOND CLOUTIER, C.M.G., B.A., L.Ph.,
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OPTICAL GOODS

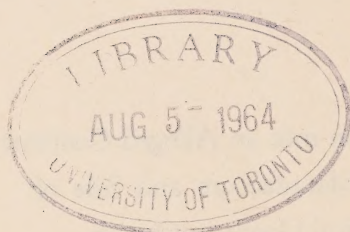


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CONTENTS

	PAGE
I. GENERAL NATURE OF THE OPTICAL GOODS TRADE.....	7
II. MANUFACTURE AND WHOLESALE DISTRIBUTION.....	10
1. Principal Manufacturers and Wholesalers.....	10
Consolidated Optical Company Limited, Toronto.....	10
Imperial Optical Company, Toronto.....	10
Bausch & Lomb Optical Company Limited, Toronto.....	10
Numont Ful-Vue Corporation.....	11
2. Medium sized Wholesalers and Manufacturers.....	11
3. Small Wholesalers.....	12
III. OPTOMETRISTS, OPTICIANS AND OCULISTS.....	13
1. General Comment.....	13
2. Optometrists.....	14
3. Opticians.....	14
4. Doctors.....	14
IV. EFFORTS TO RESTRICT COMPETITION PRIOR TO INTRODUCTION OF NUMONT FUL-VUE PLAN.....	15
1. Ful-Vue Frames and Mountings—Patent Control.....	15
2. Semi-Rimless Mountings—Patent Control.....	17
3. Other Types of Frames and Mountings.....	18
4. Lack of Wholesale Price Uniformity.....	19
5. Lenses—Patented and Trade-Marked.....	19
6. Competition in Standard Single-Vision and Bifocal Lenses.....	19
7. Pre-1939 Attempts to Lessen Competition in “Non-Corrected” Lenses and “Fused” Bifocals.....	20
8. General Relations among Wholesalers.....	22
V. INTRODUCTION OF THE NUMONT FUL-VUE PLAN.....	23
1. Nature and Purpose of the Plan.....	23
2. Montreal Meeting, March 10-11, 1939.....	24
3. Form of Wholesaler's or Distributor's Licence.....	26
4. Execution of the Wholesalers' Licences.....	26
5. Imperial Optical Company.....	27
6. Central Optical Company Limited, Montreal.....	28
7. Bausch & Lomb Optical Co. Limited.....	29
8. Supplementary Meetings of Wholesalers, May—September 1939.....	30
9. Form of Retailer's or Dispenser's Licence.....	30
10. Introduction of Retail Licences.....	31
11. Opposition to Retail Licensing.....	32
12. Quebec Association of Optometrists and Opticians.....	32
13. Patent Impeachment Action by H. Barlow, Montreal.....	33
14. Proposed Patent Impeachment Action by Superior Optical Company, Toronto.....	34
VI. THE STRUCTURE OF CONTROL UNDER THE NUMONT FUL-VUE PLAN.....	35
1. The Patents and Goods Involved.....	35
2. Manufacturing Licences.....	35
3. Wholesale Licences.....	36
4. Retail Licences.....	37
5. Extension of the Plan to Additional Types of Frame and Mounting.....	39
6. Application of the Plan to Spectacle Parts not Directly Covered by Patents..	40
7. Application of the Plan to Repairs.....	41
8. Application of the Plan to Lenses.....	41
9. General Administration of Numont Ful-Vue Corporation in Canada.....	42

VII. ESTABLISHMENT AND ENFORCEMENT OF MINIMUM PRICES UNDER THE NUMONT

FUL-VUE PLAN.....	43
1. Establishment of Minimum Prices.....	43
2. Maintenance of Prices by Manufacturers.....	44
3. Enforcement of Wholesale Licences.....	45
(1) Original Plan for Investigation and Enforcement.....	45
(2) Enforcement Primarily on Complaint.....	46
(3) Indirect Price Violations.....	47
(4) Attempts by Wholesalers to Reduce Prices on Obsolete Goods.....	47
(5) Formal Enforcement Proceedings.....	48
(a) Injunction Against Commercial Optical Company Limited, Montreal.....	48
(b) Audit of Central Optical Company Limited, Montreal.....	49
(c) Audit of Monarch Optical Manufacturers Limited, Toronto.....	49
4. Enforcement of Retail Licences.....	50
(1) General Investigation Methods.....	50
(2) Retail Sales below Minimum Prices, Montreal, September, 1939— March, 1940.....	50
(3) Hale Optical Company, Vancouver, May, 1941.....	51
(4) Indirect Price Reductions.....	53
(5) Cancellation of Retail Licence of S. Weber, Toronto.....	53
5. Failure to Take Action against Reported Infringers of Patents.....	53
6. General Enforcement Situation in Later Years.....	55

VIII. RECENT DEVELOPMENTS RELATING TO PATENT CONTROL..... 57

1. Expiration of the First Ful-Vue Patent, October 25, 1945.....	57
2. Impeachment Action by the Attorney General of Canada.....	57
3. Cancellation of all Retail Licences, February, 1947.....	58
4. Release of Standard Ful-Vue Goods from Wholesale Licence Control, March, 1947.....	58
5. Release of Standard Ful-Vue Goods from Manufacturing Licence Control, December, 1946.....	59

IX. AGREEMENTS AND ARRANGEMENTS RESPECTING LENSES..... 60

1. Effect of the Numont Ful-Vue Plan.....	60
2. General Agreements Respecting Lenses in 1939.....	61
3. Arrangements Respecting Fused Bifocals.....	62
4. The "Non-corrected" Lens Problem.....	64
5. Elimination of "Celex" Lenses in Western Canada.....	65
6. Arrangements in Eastern Canada respecting "Celex" Lenses.....	66
(1) Elimination of Celex uncut lenses to retailers.....	66
(2) Elimination of Celex prescription list.....	67
7. Lessening of "Celex" Competition between Manufacturers.....	68
8. Effects of Restriction of Sales of "Celex" Lenses.....	68
9. Price Increases by Wholesalers in September, 1946.....	69
10. General Relationship between Consolidated and Imperial respecting Lenses..	69

X. WHOLESALING UNDER THE RESTRICTIVE ARRANGEMENTS..... 71

1. Effects on Wholesalers Selling United States Frames and Mountings.....	71
2. General Effect on Small and Medium-sized Wholesalers.....	73
3. Reduction of Price Competition at Manufacturing and Wholesale Levels.....	74
4. Wholesalers' Acceptance of Restrictive Arrangements.....	75

XI. RETAILING UNDER THE RESTRICTIVE ARRANGEMENTS..... 77

1. Attitude of Retailers.....	77
2. Minimum Resale Price Maintenance.....	78
3. Retail Prices in 1947.....	81
4. Rebating.....	85
5. The "American Plan" and Professionalism.....	88

XII. PATENTS AND RESTRAINT OF TRADE..... 93

1. Jurisdiction.....	93
2. Use of the Patents in Undue Restraint of Trade.....	95

XIII. CONCLUSION..... 98

APPENDICES

	PAGE
I. PATENTS AND TRADE MARKS.....	103
II. LIST OF MANUFACTURING LICENSEES.....	105

TABLES (NUMBERED)

1. SOURCES OF OPTICAL GOODS SOLD IN CANADA.....	8
2. MANUFACTURING AND WHOLESALE LENS PRICES, JANUARY, 1939.....	20
3. EXAMPLES OF PRICES OF GOODS AFFECTED BY NUMONT FUL-VUE PLAN, FEBRUARY, 1941.....	38
4. CLASSIFICATION OF OPTOMETRISTS AND OPTICIANS ACCORDING TO GROSS RECEIPTS, 1941 AND 1946.....	80
5. CLASSIFICATION OF OPTOMETRISTS AND OPTICIANS ACCORDING TO NET INCOME, 1941 AND 1946.....	80
6. AVERAGE RETAIL PRICES AND WHOLESALE COSTS OF COMPLETE SPECTACLES—MAY-JULY, 1947.....	82
7. CLASSIFICATION OF RETAILERS ACCORDING TO AMOUNTS RECEIVED FOR COMPLETE SPECTACLES—ALL PROVINCES, MAY-JULY, 1947.....	83
8. CLASSIFICATION OF INDEPENDENT OPTOMETRISTS ACCORDING TO AMOUNTS RECEIVED FOR COMPLETE SPECTACLES, BY REGIONS, MAY-JULY, 1947.....	84

COMBINES INVESTIGATION COMMISSION

DEPARTMENT OF JUSTICE

OTTAWA

April 24, 1948.

Right Honourable J. L. ILSLEY, K.C.,
Minister of Justice,
Ottawa

SIR,—I have the honour to submit to you the following report of an investigation under the Combines Investigation Act into an alleged combine in the manufacture and sale of optical goods in Canada. Preliminary inquiries were conducted in 1940 following receipt in September, 1939, of a formal application under Section 11 of the Combines Investigation Act, alleging that a combine had been formed in connection with a patent licensing system administered by Numont Ful-Vue Corporation of Toronto. Investigation was not continued because action under the Patent Act had been instituted in the Exchequer Court by the Attorney-General of Canada to have declared invalid certain of the patents involved. It was considered at that time that such action, if successful, might remove the basis of the restrictive arrangements alleged. Late in 1946, the Exchequer Court action not having been completed, investigation was resumed on a broader basis under Section 12 of the Combines Investigation Act.

The investigation has been directed to the activities of persons engaged in the manufacture and sale of optical goods in Canada during the years 1939 to 1946 inclusive.

Hearings were held in Toronto, Ottawa and Montreal before me and before Mr. I. M. MacKeigan, Deputy Commissioner, during February, March and April, 1947. Thirty-two witnesses were examined on oath during thirteen days of hearings. Written briefs were submitted by counsel for the Commission and by many of the companies and persons involved. Oral argument was submitted to me by some members of the alleged combine at Ottawa on November 19 and 20, 1947.

The assistance of Mr. Peter Wright, barrister of Toronto, who was appointed by the Minister of Justice to act as counsel in the investigation, has been of the greatest possible value.

The progress of the inquiry was greatly assisted by the co-operation of those from whom information was requested. In this connection mention should be made of the willingness of optical firms to furnish returns requested and the assistance rendered by those who completed the questionnaires relating to the supply of optical services to the public. American Optical Company of Southbridge, Mass., voluntarily produced information which would not otherwise have been available in Canada, and had one of its officials appear for examination. Counsel for American Optical Company and Consolidated Optical Company, as well as counsel appearing for others involved in the inquiry, assisted in a very marked degree in producing information and seeing that as full facts as possible were presented.

Yours faithfully,

F. A. MCGREGOR

*Commissioner,
Combines Investigation Act*

REPORT TO THE MINISTER OF JUSTICE

I. GENERAL NATURE OF THE OPTICAL GOODS TRADE

This report is concerned with trade arrangements relating to the manufacture, distribution and sale of optical goods or, more precisely, of ophthalmic goods. As used throughout this report, the term "optical goods" means ophthalmic lenses together with frames, mountings and parts thereof, which go to make up spectacles or eyeglasses worn to correct defective vision.

It has been estimated that one of every four or five persons in Canada wears spectacles. The more careful attention to defects in vision among children and greater recognition generally of the corrective results which may be secured through the use of properly fitted eyeglasses have increased the public demand for these products.

At the same time changing fashions and extensive institutional and other advertising have given rise to a wide variety of styles and designs of spectacle frames and mountings. In each style there must be a range of sizes to fit the different users. Lenses for the spectacles must provide the corrective elements necessary for both eyes of the user and thus may be in any two of hundreds of combinations of corrective powers. They may differ in quality and they may differ in shape according to the style desired.

Although the use of lenses to correct defects in vision may be traced back over a long period, it is within relatively recent years that the trade in optical goods has assumed its present form. The wider range of manufactured products, the existence of patented devices, and the much greater investment and technical or professional training necessary at each stage of production and distribution have all had their effect. The existing structure of the trade is briefly outlined here.

Manufacturers of optical goods include those firms which produce spectacle frames, mountings and parts and those engaged in basic lens manufacture. The latter consists of the processing by large scale methods of ophthalmic lenses from unfinished blanks into semi-finished lenses (ground on one side) and uncut lenses (ground on both sides).

The main functions of the wholesaler are to carry a diversified line of lenses, frames and mountings for sale to retailers, and to process lenses according to their requirements. The wholesaler's sales to the retailer may be either of quantity lots for stock or of single items prepared to fill the specific requirements of particular customers of the retailer. The latter type of sale is known in the trade as a prescription (Rx) sale. "Stock price lists" and "prescription price lists" thus figure largely in this report.

Single-vision lenses, the type used in perhaps 75 per cent of all spectacles, are usually received by the wholesaler from the manufacturer in uncut finished form. Stock sales to retailers are usually made in the same form. A prescription sale, however, requires further finishing of the uncut lens. The wholesaler will then ordinarily take from stock a lens of the power ordered, edge it (that is, cut the edge to the shape desired), and, if ordered, drill holes necessary to attach it to a rimless or semi-rimless mounting, and, again if the retailer's order so specifies, place it in the frame or mounting.

If, however, the retailer orders a bifocal lens or a single-vision lens of a high power not commonly carried in stock, the wholesaler must use grinding equipment to produce the required lens from a rough blank or from a semi-finished lens.

Most consumers obtain their spectacles from optometrists, who not only supply the completed spectacles but also perform the services of examining eyes and prescribing corrective lenses. Glasses are also supplied to consumers in considerable volume by opticians, by wholesalers performing a retail function, and by miscellaneous dispensers such as druggists and jewellers—all of whom fill prescriptions issued by medical doctors.

The variety of trades and professions involved in the task of supplying spectacles to the public has posed a problem in nomenclature. There is no term universally recognized to describe all those who perform the retail function. The word "dispenser" used by many for that purpose is not entirely accurate since it connotes the filling of prescriptions, most of which are actually filled by wholesalers. To avoid this difficulty the readily understood terms "retailer" and "retail trade" will be generally used throughout this report. These terms are not employed in any narrow sense or in disregard of the professional and other services performed in supplying eyeglasses, but merely to indicate the final step in the distribution of optical goods. Similar considerations apply to the use in this report of words such as "sale" and "price", with reference to eyeglasses supplied to consumers.

Generally it may be said that the various functions of manufacture and distribution of optical goods are not clearly defined as in some trades. Firms engaged in manufacturing may perform wholesaling and retailing functions; wholesalers may both manufacture and sell at retail; retailers may engage in limited manufacturing and also perform professional and technical services.

Canadian requirements of optical goods have been met increasingly from domestic manufacture in recent years, approximately 65 per cent of the 1946 total being made in this country. Consolidated Optical Company Limited of Toronto accounted for over 90 per cent of the domestic production of spectacle frames and mountings and, together with Imperial Optical Company of Toronto, about 90 per cent of the basic lens output. Almost all optical goods used but not produced in Canada are imported from the United States.

Consolidated and Imperial also have a predominant position in the wholesale distribution of optical goods, a large part of the output of their manufacturing operations providing the stock-in-trade for their chains of wholesale branches. The combined sales of these two firms to retailers in 1946 were almost three-quarters of the total Canadian wholesale trade. The remaining quarter of the Canadian wholesale trade was divided between the Bausch & Lomb Optical Company Limited, which acts chiefly as a jobber-wholesaler for its parent company in the United States, and about twenty medium-sized and small wholesalers. Consolidated, Imperial and Bausch & Lomb also supply the greater part of the requirements of these twenty companies.

The following table, largely based on returns received from optical goods companies, shows the sources of optical goods sold in Canada:

TABLE 1—SOURCES OF OPTICAL GOODS SOLD IN CANADA

Percentage of dollar value

	Frames		Lenses		Total	
	1939	1946	1939	1946	1939	1946
	%	%	%	%	%	%
Canadian manufactured goods.....	43.4	54.2	84.5	80.8	59.3	64.7
Imports from the United States.....	55.5	45.7	11.5	18.7	38.5	35.1
Imports from other countries.....	1.1	.1	4.0	.5	2.2	.2
	100.0	100.0	100.0	100.0	100.0	100.0

Many imported lenses were of specialized, more expensive types, including patented bifocals and specially tinted lenses. Numerically, the vast majority of lenses sold in Canada are of Canadian manufacture. This is especially true respecting the standard popular lines, including "corrected" and "non-corrected" single vision lenses, and fused and Kryptok bifocals. Bausch & Lomb is the only substantial importer of these popular lines and it imports only the higher grades of them.

Optical goods are imported into Canada under Items 326A, 327, 328 and 759 of the Canadian Customs Tariff. The rates of duty were unchanged during the period 1939 to 1946, but imports were affected, of course, by the war exchange tax and changes in foreign exchange rates. The tariff rates applicable to optical goods imported from the United States, and from most other countries except the United Kingdom, were as follows:—

Frames, $17\frac{1}{2}$ per cent; finished lenses, $27\frac{1}{2}$ per cent (reduced to $22\frac{1}{2}$ per cent in 1947); uncut and semi-finished lenses, $17\frac{1}{2}$ per cent; optical glass, free.

In 1946 sales of optical goods to retailers by the twenty-two principal wholesale firms exceeded \$8,400,000, two-and-a-half times the 1939 total. At the same time the Canadian public spent more than \$18,000,000 on the goods and services involved in the provision of eyeglasses.

II. MANUFACTURE AND WHOLESALE DISTRIBUTION

1. Principal Manufacturers and Wholesalers

Consolidated Optical Company Limited, Toronto. Incorporated in 1907, this company is a wholly-owned subsidiary of American Optical Company of Southbridge, Mass., U.S.A., which is by far the largest manufacturer and wholesaler of optical goods in the United States. Consolidated operates a lens factory at Belleville, Ontario, a frame factory at Nicolet, P.Q., and, in 1946, twenty-seven wholesale branches across Canada. Consolidated manufactured in 1946 over 90 per cent of spectacle frames and mountings and over 40 per cent of ophthalmic lenses manufactured for sale in Canada. Through its factory sales to other wholesalers, including Imperial Optical, and through its own wholesale sales to retailers, it supplies about 50 per cent of all optical goods handled by the trade, whether manufactured in Canada or imported from other countries.

On April 1, 1947, Consolidated Optical Company Limited changed its corporate name to American Optical Company Canada Limited. In this report, however, it will be referred to under its older name.

Its principal officials were R. F. Reid, general manager until November, 1940; W. R. Lett, general manager since November, 1940, and previously manager of the Vancouver branch; C. J. Atkinson, sales manager; and W. G. Coffin, manager of the Montreal branch. Principal officials of the United States company supervising Consolidated Optical were W. A. Stewart, I. W. Wilson and the late C. O. Cozzens.

Imperial Optical Company. This is the trade name under which Percy Hermant Limited of Toronto carries on its business of manufacturing and wholesaling optical goods. This limited company, incorporated in 1921, is controlled by Percy Hermant of Toronto and has interests in many fields other than the regular optical goods trade. Percy Hermant Limited or Percy Hermant personally also controls National Optical Company Limited of Montreal, Imperial Optical Company Limited (New Brunswick), and Imperial Optical of Nova Scotia Limited. Retail dispensing to consumers is carried on in many centres under various names, including especially Optical Prescription Company. Reference in this report to "Imperial Optical Company" will be deemed to include, unless otherwise indicated, all Hermant interests in the optical trade.

Imperial Optical manufactures about 50 per cent of Canadian-made lenses sold in Canada but not more than 5 per cent of spectacle frames and mountings. It supplies other wholesalers but to a much smaller degree than Consolidated Optical. It is the largest seller of optical goods to the retail trade, selling through 36 branches throughout Canada.

The principal officials of Imperial, besides Percy Hermant, are Sydney Hermant, Toronto, C. A. Epp, Toronto, and J. A. LeBer, manager of National Optical, Montreal.

Bausch & Lomb Optical Company Limited, Toronto. This company was incorporated in 1935. It is a wholly-owned subsidiary of Bausch & Lomb Optical Company, Rochester, N.Y., which is the second largest manufacturer and wholesaler of optical goods in the United States. Until 1944, when it acquired Central Optical Company Limited of Montreal, it operated only at Toronto. It is a relatively new entrant in the Canadian field and its position is much less important than Consolidated or Imperial. It does not manufacture

frames or lenses in Canada (although it has begun construction of a Canadian lens plant) and it sells principally goods manufactured by its parent firm. It is an important supplier of several smaller wholesalers. In the two centres in which it operates its sales to retailers are substantial, but these sales represent only a small proportion of the total Canadian sales to retailers. It makes no sales to consumers. Because of the financial and technical resources of its parent company and the wide variety of goods it can offer, Bausch & Lomb's influence and potential strength in the Canadian market is much greater than is indicated by its proportion of current trade. The principal Canadian officials are L. E. Amsden, general manager, and R. I. Ingram, assistant general manager. Principal officials of the United States company assisting in the direction of Canadian activities were B. A. Ramaker and the late Platt Moody.

Numont Ful-Vue Corporation. Although not a manufacturer or wholesaler, this company figures largely in this report. An American company, with head office at Southbridge, Mass., but licensed to do business in Ontario with registered office at Toronto, it is wholly controlled and financed by American Optical Company. Making no sales of goods and receiving no Canadian income by royalty or otherwise, its sole function has been to administer the wholesale and retail patent licences hereinafter described. Canadian manager of Numont Ful-Vue Corporation from March, 1939 until December, 1940, was J. C. Curry who, before and since, has been an official of the American Optical Company. He was succeeded as manager after 1940 by G. Rickwood. Principal officials of American Optical Company directing the Canadian licensing programme were A. K. Marsters and I. W. Wilson, both of Southbridge.

2. Medium Sized Wholesalers and Manufacturers

Six other wholesalers of importance operated in 1946. Although their total sales in 1946 represented less than 20 per cent of Canadian total sales to retailers, each was large enough to exercise, during the period under review, a significant effect on the market at certain times with reference to certain products in the particular areas they served. These six were:

(1) *Kahn Optical Co. Limited, Toronto*, with branches in Montreal, Kitchener, London, Winnipeg and Calgary. It is the exclusive agent of the Shuron Optical Company, Geneva, N.Y. It is controlled and managed by S. Kahn and B. Laddon.

(2) *Commercial Optical Company Limited, Montreal*, with three branches in Ontario and Quebec operated under the trade name of Colonial Optical Company. Its principal lines of frames and mountings are made by Universal Optical Company, Inc., Providence, Rhode Island. It makes a significant quantity of bifocal lenses for its own trade. It is controlled and managed by S. B. Coen.

(3) *Maritime Optical Company Limited, Quebec, P.Q.*, with two branches in the province of Quebec. It is controlled and managed by J. E. Valentine.

(4) *Hudson Optical Laboratory*, an unincorporated firm owned by J. S. Hudson of Vancouver, with branches at New Westminster, Calgary and Edmonton. Most of this firm's goods are obtained from Bausch & Lomb.

(5) *Monarch Optical Manufacturers Limited, Toronto*, controlled and managed by Aaron Brown. This company also manufactures bifocal lenses on a very small scale, and an affiliated company, established in 1946, Canadian Lens Mfg. Co. Limited, manufactures some single vision lenses.

(6) *Butler Optical Company, Limited, Montreal*, a long established family firm, now managed by Reynolds Butler, who succeeded the late Thomas Butler in 1941.

Reference must also be made to Central Optical Company Limited, Montreal, which, controlled by Arthur Jobin, carried on business until mid-1944 when, after Jobin's death, it was acquired by Bausch & Lomb. During the period in which it operated it ranked among the largest of this group of wholesalers. Having built up its business largely on low prices in smaller towns of Quebec and the Maritimes, it had been an important competitive factor in the business.

Late in 1946 a small manufacturer of plastic frames began operations at Deseronto, Ontario, under the name of Canada Zyl Company Limited.

3. Small Wholesalers

Twelve additional wholesalers licensed by Numont Ful-Vue Corporation operated in Canada in 1946. Most of these were so-called "prescription houses" specializing in filling prescriptions for optometrists and doctors in the local areas served. Although ranking as wholesalers, the sales and profits of most of these firms would be considerably exceeded by any of the eight or ten largest retail opticians in Canada. These twelve houses together had not more than five per cent of the total wholesale trade in 1946. They were as follows:

- Boyles Optical Company, Charlottetown, P.E.I. (inactive 1942-1946)
- George F. Brodie Optical Supplies, Toronto (since March, 1946, only)
- Canadian Optical Service Co. Ltd., Quebec, P.Q.
- Champlain Optical Co. Reg'd, Quebec, P.Q.
- Garnett Optical Co. Ltd., Halifax, N.S. (since 1945 only)
- General Optical Company, Montreal, P.Q. (since 1945 only)
- H. & M. Optical Co. Ltd., Toronto, Ont.
- K. & W. Optical Co., Kitchener, Ont.
- L'Optique Laviolette, Three Rivers, P.Q.
- Premier Optical Company, Saskatoon, Sask. (formerly Prince Albert, where business was started in 1944)
- Sterling Optical Co. Ltd., Toronto, Ont.
- United Optical Reg'd, Sherbrooke, P.Q.

The largest of these were Sterling Optical, Canadian Optical Service, H. & M. Optical and Garnett Optical. Active prior to bankruptcy in 1947 was Regal Optical Co. Ltd., Toronto, which until 1945 was known as Crown Optical Company.

III. OPTOMETRISTS, OPTICIANS AND OCULISTS

1. General Comment

The functions performed by oculists, optometrists and opticians in providing the Canadian public with eyeglasses should be briefly described. There are two types of function: (1) examination and refraction (followed by a prescription if the need of glasses is indicated); and (2) filling of the prescription (usually referred to in the trade as "dispensing").

Examinations and refractions may be made (1) by a medical doctor (a doctor specializing in this work is known as an ophthalmologist or oculist; he is qualified not only to refract and to prescribe glasses but also to give other medical or surgical treatment as required); or (2) by an optometrist (who also fills the prescription or has it filled and supplies the lenses in the frames or mountings chosen by the wearer). There is nothing, of course, to prevent any person selecting his own glasses after testing his own eyes on a trial and error basis, where means are available.¹

A doctor's prescription is normally filled for the patient by one of the following: (a) an optician; (b) a wholesaler of optical goods; (c) a druggist, jeweller, or other retailer who does a part-time business as optician; or (d) the doctor himself, particularly in areas where there are no full-time opticians. In the latter two cases the completed spectacles are usually obtained for the consumer from a wholesaler.

No reliable statistics exist respecting the total expenditures by the public for optical goods and services. The following estimate for 1946 is based upon questionnaires and returns received from the great majority of those involved in supplying such goods and services:

Optometrists ²	\$14,000,000
Full-time Opticians	1,700,000
Retail Sales by Wholesalers	1,400,000
Miscellaneous Dispensers, (Druggists, Jewellers, Doctors, etc.)..	1,200,000
Total	\$18,300,000

Excluded from the above total is the amount paid directly by patients to medical doctors for examination and prescription. Such payments are specially difficult to compute since doctors do not record fees for such services separately from fees for other medical services rendered.

Retail trade in 1939 is even more difficult to estimate. The best estimate, confirmed by most witnesses who were examined on the point, is that total retail sales almost tripled between 1939 and 1946. The division of the trade among classes was approximately the same in 1939 as in 1946 except that "miscellaneous dispensers" apparently had a slightly larger proportion of the total business in the earlier period. Regional differences exist in division of the trade among classes. For example, almost all doctors' prescriptions in Ottawa are filled by dispensing opticians, but in Halifax and Regina most are filled by wholesale houses or by the doctors themselves getting the prescriptions filled and turning the glasses over to the patients.

Further statistical data respecting optometrists and opticians are found in chapter XI.

¹ Retail sales of ophthalmic spectacles by variety stores totalled over \$75,000 in 1946 with prices from 49 cents to \$1.89. Frames are usually plastic or white metal; most lenses are ground on a flat base but some are ground on a curved base. Mail order sales in 1946 amounted to nearly \$50,000, with prices of \$2.98 and up. Self selection of this sort is usually limited to simple cases of distance correction. Sales on a self-selection basis are prohibited in Quebec.

² Includes optometrical departments of merchandising establishments.

2. Optometrists

More than 1,250 optometrists were registered in 1946 under the provincial optometry acts. These statutes, or regulations made thereunder by the governing bodies of the profession, prescribe educational standards for optometrists and provide for professional discipline. In Canada the two educational institutions which provide courses in optometry are affiliated with the University of Toronto and the University of Montreal and require a training extending over three or four years. Most optometrists operate their own establishments or are employed by other optometrists. Many are, however, employed by department stores and jewellers. A few optometrists practise only as opticians and are so classified in this report.

Many optometrists have their prescriptions for complete spectacles filled by wholesalers, specifying in their orders the power and type of lens, and size and type of frame. Lenses alone are frequently ordered on a prescription basis (i.e., one by one as required) ready to be placed by the optometrist in frames previously obtained in stock quantities. Not more than 5 per cent of Canadian optometrists have surfacing equipment to finish a semi-finished lens (ground on one side only) and only 35 per cent have edging machines to shape uncut finished lenses to fit particular frames. Not more than 40 per cent have drilling machines to drill holes in finished lenses for use in rimless or semi-rimless spectacles. Furthermore, many of those who have machinery now rarely use it, preferring to buy the lenses ready-made. Thus the dispensing function of most optometrists consists of ordering lenses and frames, checking them, mounting the lenses in frames when this has not been done, making any necessary adjustments to fit the wearer, and providing any subsequent service that may be needed.

3. Opticians

Of all those making returns in answer to our questionnaires, only 28 reported that they were practising as full-time opticians. It is estimated that there are not more than fifty full-time retail optician establishments in Canada. Most of them are in Montreal and the larger cities of Ontario, and in these centres they do a very significant and apparently increasing proportion of the total business. In four provinces, Ontario, Quebec and, to a lesser degree, New Brunswick and Saskatchewan, opticians are subject to statutory regulation. In Ontario, New Brunswick and Saskatchewan they are subject to certain sections of the provincial optometry acts and in Quebec they are regulated by separate statute. In Ontario the training period required for opticians is a year less than that for optometrists; the other three provinces do not require such extensive formal training. Opticians have no right to test eyes and prescribe glasses. They are usually highly skilled technicians qualified to fill prescriptions and to perform all the technical functions involved. In most cases they are manufacturers on a small scale, edging and drilling lenses and often doing some surfacing of lenses.

4. Doctors

It is almost impossible to ascertain exactly how many medical doctors examine eyes and prescribe glasses. The Canadian Ophthalmological Society has 120 members, but many ophthalmologists or oculists qualified by special post-graduate training are not members of the society. Furthermore many general practitioners, especially in rural areas, frequently examine and prescribe. More than four hundred doctors were licensees of Numont Ful-Vue Corporation as hereinafter described, and it can be assumed that at least this many commonly prescribe glasses. It is also estimated that approximately two hundred of these fill their own prescriptions and supply the glasses to the patients.

IV. EFFORTS TO RESTRICT COMPETITION PRIOR TO INTRODUCTION OF NUMONT FUL-VUE PLAN

The optical supply trade in Canada, as has already been indicated, was marked in the period prior to 1939, as it has been since, by the outstanding positions held by Consolidated Optical and Imperial Optical. These two companies were responsible for more than 90 per cent of all basic lens manufacture in Canada. Consolidated, in addition, made almost all frames and mountings manufactured in Canada. Competition in the optical trade was therefore affected substantially by the policies pursued by these two firms and by the opportunities available to the smaller wholesale distributors (and to Imperial in the case of frames and mountings) for the purchase under competitive conditions of optical supplies. These opportunities were influenced by the tariff duties applying on imported goods and, more significantly, by the increasing control which American Optical Company, the parent of Consolidated and the largest American manufacturer, was able to exercise through patent licences over manufacturing in the United States. Competition in the pre-war period was largely evident in the sale of non-patented lenses and in the margin between the substantially uniform manufacturers' prices for standard frames and mountings and the prices at which such goods were sold to optometrists and opticians.

1. Ful-Vue Frames and Mountings—Patent Control

From 1930 on there was increasing consumer demand, fostered by advertising, for frames and mountings of the so-called Ful-Vue type. In 1938 and 1939 over half of all frames and mountings sold were of this type, in which the temple or ear attachment is fastened to the lens or front at a point above the centre-line of vision. The Ful-Vue feature is patented in Canada, the United States and other countries, and thus a substantial part of the trade in frames and mountings was controlled, at the manufacturing level, by the conditions attaching to licences under the patents. The principal Canadian patents are held by Ful-Vue Sales Company of Washington, D.C. See Appendix I. Ful-Vue Sales granted American Optical Company the sole right to manufacture under the patents. American Optical itself also held an important patent of the Ful-Vue type. American Optical granted manufacturing sub-licences, under the Canadian Ful-Vue patents and under related Canadian patents owned by it, to its Canadian subsidiary, Consolidated Optical. To facilitate control of similar goods produced by other American manufacturers when sold in Canada, American Optical granted them licences under the Canadian patents.

American manufacturers selling in the Canadian market were required by their licences to observe "prices, discounts, terms, sales plans, and sales regulations" established by American Optical. They agreed that, without approval by American Optical, they would not sell any Ful-Vue product of the design, quality and trade-name specified in the licence. Prices fixed were to be equal to or higher than American Optical's prices for its own comparable products. The sub-licensees also agreed to permit the licensor to inspect their books and records of sales of Ful-Vue items and not to contest the validity of the patents. The licences also prohibited separate sale of end-pieces or fronts. This provision was obviously designed to prevent what the patentees claimed would be infringe-

ment of the patent by purchasers attaching standard temples not made under the licences to patented fronts or end-pieces.¹ The licences also specifically banned sales to England, Northern Ireland, France and Germany.

Such licences were accepted by all principal United States manufacturers, including Bausch & Lomb, Shuron Optical, Bay State Optical, Martin-Copeland, Universal Optical, Continental Optical and Arcraft Optical. See Appendix II. The only Canadian manufacturer licensed at this time was American Optical's subsidiary, Consolidated Optical. Although American Optical reserved the right, later exercised, of establishing detailed sales plans, it apparently did not do so for the Canadian market prior to March, 1939. Standard models and uniform manufacturer prices and discounts were, however, established. Available evidence does not show that manufacturers at that time were restricted as to the Canadian dealers to whom they could sell or that such dealers were required to observe specific terms. Some terms of sale imposed by the licences on manufacturers were, however, in practice followed by wholesalers. For example, Imperial Optical of Toronto, at least in 1936 and 1937, tried to observe strictly the provision that Ful-Vue end-pieces and fronts could not be sold without temples, telling its branches that "this policy is laid down by the Ful-Vue patentees . . ."

Prices fixed for manufacturers were enforced strictly by American Optical, and manufacturers generally observed them closely. An example of American Optical's close supervision is found in a letter written in February, 1938, by one of its officials to Consolidated in which the latter was instructed to check with the Canadian customs authorities to ensure that full duty had been paid by Imperial Optical on a shipment of Ful-Vue temples from an American manufacturer, United Optical Company. It was pointed out that the temples should have cost Imperial 96 cents, "if they were being sold as they should be by the American licensees". Imperial was alleged to have sold the temples to another Canadian wholesaler for 76½ cents.

Although American Optical closely checked manufacturers' prices for all Ful-Vue products, shell or plastic frames in the Ful-Vue design were less effectively controlled than metal Ful-Vues. Shell and plastic types of frame, just beginning to show promise of their later popularity, could be produced by small manufacturers, since much less capital was required than for the manufacture of metal spectacles. In February, 1938, a senior official of Imperial Optical summed up the situation:

"In shell [frames] they [the patentees] have not been worrying too much. They apparently know the situation and did try to police the industry up to a point but apparently met with price competition from so many sources that they let the matter drop."

He went on to mention that he could recall manufacturers' prices as low as 60 cents in the United States for a shell Ful-Vue frame. This price would compare with 83 cents, the lowest manufacturers' price under the licence.

Canadian wholesalers were unable to purchase Ful-Vues from the United Kingdom, because manufacturers licensed under the English Ful-Vue patents were prohibited from selling to Canada, and, besides, sale of English Ful-Vues in Canada would constitute an infringement of the Canadian patents. One Canadian wholesaler, Central Optical of Montreal, since taken over by Bausch & Lomb, succeeded in 1938 in obtaining a small quantity of Ful-Vue end-pieces, and later also temples, from Germany. These were of gold-filled construction and reasonably attractive design, but of slightly lower gold content than the standard American Optical product. Central sold sets of these temples and

¹Temples: the parts that extend along the side of the head to hold the spectacles in place.
End-Piece: the hinged device that attaches the temple to the rim, or in the case of rimless mountings, to the lens.

Front: all parts, except temples, of a frame or semi-rimless mounting.

ends to quantity purchasers at as low as 43 cents per set, whereas Consolidated's lowest price at that time was 87 cents. American Optical naturally made efforts to stop importation of these infringing goods. The customs authorities at Ottawa were informed that the goods infringed Canadian patents and officials administering the Gold Marking Act were told of the low assay results. In January, 1939, Central was cut off the "A. O. Co. list", and therefore could not obtain supplies from Consolidated. No court action was taken, however, against Central for infringement of the patents, notwithstanding its continued sale of the German Ful-Vues.

Prior to 1939 all manufacturing licensees in the United States were required to sell comparable Ful-Vues at the same price as American Optical. Beginning about January, 1939, a differential was established between Ful-Vue goods sold by the larger manufacturers, referred to as Group "A", and those sold by Group "B". The prices fixed for Group "B" were about 10 per cent lower than those for the larger manufacturers. This differential did not apply to sales in Canada, which were made at Group "B" prices by all manufacturers.

American Optical's general attitude toward the Ful-Vue manufacturing licences is illustrated by a letter of April 15, 1935, written by American Optical to J. & R. Fleming Ltd., London, England, the principal British optical goods manufacturer. The letter, photostat of which is filed as an exhibit in the Exchequer Court of Canada, was signed by "H.H.S.", as Attorney in Charge of Patents, American Optical Company. The English company had referred to its concern about interpretation and enforcement of certain of the Ful-Vue type patents in Great Britain and the Continent. "H.H.S." (presumably H. H. Styll) said:

"The Continental patents went down on the theory of the high end piece. In our American patents we realized that it was not safe to go down on . . . the idea of the high end piece per se, but that we should cover . . . the changes in structure . . . needed in order to produce a spectacle structure wherein the end pieces were transferred from the central line to a line above center. We very fortunately were able to get hold of both the Smith and Emons patents, when we had a pretty good idea of what we wanted to do, and handled the re-issue of these patents ourselves, *so as to make them fit the business structure which we wished to create* . . . [Italics not in the original]

In addition to this, we took the patents and after a careful study of them decided that in order to avoid any patent question we would license the whole art. Therefore, in America we have licensed all the other manufacturers in the art under a licence agreement by which they agree to acknowledge the validity of the patents, and not to contest them, so that when it comes to a legal question we can proceed on the law of contracts, leaving the patents out of it . . . That is the strength of our American situation, and it is a condition that does not exist in England or Continental Europe . . .

We are wondering if it would be possible to develop any system of licensing to bring about a condition similar to that which we have in the United States. If such a condition could be brought about it would have the effect of stabilising the price situation, at least."

2. Semi-Rimless Mountings—Patent Control

In 1938 a new type of mounting, successfully designed to capture the public fancy, appeared in the form of the Numont mounting, a so-called semi-rimless mounting with lenses attached only at the nose-piece or bridge and with a bar running behind and parallel with, but not touching, the top edge of each lens to join the temple or ear attachment. The name "Numont Ful-Vue" was applied to all makes of this new mounting in order to remind customers that it also was claimed to be covered by the Ful-Vue patents because the temple was above the centre line of vision. It was patented in the United States and Canada by Uhlemann Optical Company of Chicago. In Canada patents were applied for in 1938. See Appendix I. American Optical acquired exclusive manufacturing rights in both countries and granted manufacturing sub-licences generally similar

to the Ful-Vue licencees but to a much smaller group of the larger United States manufacturers, consisting, as of May, 1939, of Bausch & Lomb (U.S.), Bay State Optical, Shuron Optical, Continental Optical, Martin-Copeland Co., and also its Canadian subsidiary, Consolidated Optical. These licencees required that manufacturers observe prices, standardization of models, discounts, and sales plans as established from time to time by American Optical.

Distribution of Numonts began in Canada on a limited scale about August, 1938, but extensive manufacture in the United States and consequent wide distribution here did not occur until well on in 1939. From the beginning, however, American Optical exercised under its licencees much closer control of Canadian distribution of Numont mountings than had existed for ordinary Ful-Vues. Sales could be made only to designated wholesalers, who in turn were induced to observe specific terms as to price and discounts and also to require retailers to observe the "suggested" resale prices for the Numont mounting.

Wholesale prices on Numonts were net prices, not subject to what was known as the "Big Dealer" discount, then applicable to almost all other ophthalmic merchandise. This discount allowed by American Optical permitted a credit of 25 per cent to a retailer on purchases of more than \$500 worth of goods in a month, and of 33 $\frac{1}{3}$ per cent on purchases of more than \$1,000.

3. Other Types of Frames and Mountings

Individual United States manufacturers of other frames and mountings containing patented parts or features had in several instances established control of wholesale and retail prices and of sales terms through patent licencees. None of these, except the "Loxit" mounting of Bausch & Lomb, was at any time substantially significant in the Canadian trade and even the Loxit mounting probably at no time constituted more than 5 per cent of all frames and mountings sold.

The term "Loxit" is a trade mark of Bausch & Lomb designating a patented soldered brad used to replace the small screw more commonly used to connect the prongs of the "straps" which hold in place lenses of rimless or semi-rimless mountings. Loxit mountings sold for approximately 15 per cent more than non-Loxit mountings. The term also extends to mountings or complete spectacles incorporating this feature and to machines used by wholesalers and dispensers to attach lenses to the Loxit mounting. Patents on these features are held by Bausch & Lomb.

Loxit mountings were handled at wholesale and retail only by Loxit licenseees. Licensees agreed to observe resale prices specified by Bausch & Lomb pursuant to the patent licencees. Furthermore only Loxit machines, which at that time were leased but not sold by Bausch & Lomb, could be used to attach lenses to Loxit mountings and they could be used only for that purpose. The licence provisions were actively enforced by Bausch & Lomb.

The Loxit feature was used not only in "regular" or non-Ful-Vue mountings, but also in Ful-Vue and Numont mountings, and, when so used, prices had to be approved by American Optical as in the case of non-Loxit Ful-Vues or Numonts.

In 1938-1939, almost all wholesale sales, in the province of Quebec, of Loxit and other Bausch & Lomb products were made by National Optical, Maritime Optical, and Canadian Optical Service, who had agreed, at least as early as February, 1939, to a common pricing basis for sales of such products to retailers. This arrangement, approved by Bausch & Lomb, resulted in generally uniform prices higher than the wholesale prices for such products in other provinces.

4. Lack of Wholesale Price Uniformity

Canadian wholesale prices for frames and mountings displayed little uniformity, prior to 1939, except for Numont, Loxit, and, to a much lesser degree, Ful-Vue frames and mountings. Wholesalers generally allowed a great variety of discounts and special prices. Consolidated Optical set the pattern for large wholesalers in allowing certain quantity discounts and also the "Big Dealer" discounts already mentioned. Many small wholesalers, however, had only one list price with no clearly defined discounts for quantities purchased, and made special deals to get business. Official price lists for Ful-Vue and other standard items were substantially uniform, but special terms prevailed to such a degree that exact analysis of prices is impossible.

5. Lenses—Patented and Trade-Marked

In 1938 and 1939, about 16 per cent of bifocal lenses and about 20 per cent of single-vision lenses sold in Canada were subject to attempts by manufacturers or distributors to influence resale prices or to restrict sales to certain classes of retailer. In bifocals these included patented high quality lenses, such as "Panoptik", and certain other patented or trade-marked bifocals of better quality than the standard fused and "Kryptok" type of bifocal. In single-vision lenses, trade mark control was exercised notably with reference to so-called "corrected" lenses, such as "Tillyer" of American Optical, "Orthogon" of Bausch & Lomb, and "Corectal" of Imperial Optical. These three brands were very much alike and sold, at each stage of distribution, at the same or nearly the same prices.

"Panoptik" lenses, controlled by the Panoptik Company Inc. of New York, N.Y., which was in turn controlled by Bausch & Lomb (U.S.), could be sold only by licensed wholesalers and retailers. Licences, which were actively supervised and enforced, required all sellers to observe established resale prices. Most trade-marked lens licences were less formal and in terms usually required licensees merely to "do nothing which might adversely affect the prestige or value" of the product, this being interpreted in practice as a requirement to observe resale prices. Retail licences were usually issued only to selected "ethical" optometrists and opticians who could be expected to abide by their letter and spirit. Wholesale and retail prescription prices established in this period for these lenses were equal to, or in some cases slightly higher than, those later established for such lenses under the Numont Ful-Vue licences hereinafter discussed.

6. Competition in Standard Single-Vision and Bifocal Lenses

In striking contrast to the relative uniformity of wholesale and retail prices of patented and other special lenses was the great variety in price and vigorous price competition existing at this time in the sale of fused bifocals, most "Kryptok" bifocals and so-called "non-corrected" single vision lenses. Such lenses could be readily finished or "manufactured" in whole or in part by most wholesalers and some retailers. This could not be done to the same degree with most of the special or better quality lenses. Furthermore, prior to September, 1939, lenses of the less expensive type could sometimes be imported at relatively low prices from France, England and Germany.

Two price classes of standard bifocal and two of "non-corrected" single-vision lens were recognized by the trade. These were "Kryptok" and "fused" bifocals, and "Centex" and "Celex" single-vision lenses respectively, the first named being the higher priced lens in each case. Lenses sold at prices not approximating these were termed "fused" and "Celex" respectively. Principal

wholesalers had their own trade names for these four price classes, assigning lenses to them for sale in accordance with their inspection standards and customer demand.

Manufacturing and wholesale prices quoted by Consolidated as of about January 1, 1939, are shown in the following table:

TABLE 2—MANUFACTURING AND WHOLESALE LENS PRICES, JANUARY, 1939¹

	Single-Vision		Bifocal	
	Centex	Celex	Kryptok	Fused
	\$	\$	\$	\$
Stock—				
Blanks (not finished on either side) to retailer.....	0.14	1.50	1.00
Semi-finished (finished one side)				
To wholesaler	0.37	0.27	1.67	1.17
To retailer.....	0.55	0.30	2.50	1.75
Uncut (finished both sides, not edged)				
To wholesaler	0.50	0.30		
To retailer.....	0.60	0.36		
Prescription—				
(Single pairs, finished, to retailer)				
Uncut ²	1.12	0.56	4.00	2.20
Edged.....	1.40	0.70 ³	4.50	2.70 ³

¹ Prices are for lowest foci per Consolidated Optical list. Prices to wholesalers are computed according to the then current practice, viz., 1/3 off second column, stock list, and are identical with lowest prices to retailers enjoying the largest "big dealer" discounts.

² No single pair uncut list was published at the time, but price generally quoted was 20% off prescription list for single vision and 50c. off for bifocals.

³ Sales as low as 45c. for Celex lenses and \$1.50 for fused bifocals were reported to have been made by Quebec wholesalers in this period.

7. Pre-1939 Attempts to Lessen Competition in "Non-Corrected" Lenses and "Fused Bifocals"

All wholesalers giving evidence agreed that for many years prior to 1939 efforts had been made from time to time to establish uniform lens prices, especially for prescription lenses. Writing in February, 1936, Amsden of Bausch & Lomb said:

"There is a possibility of a Wholesalers Association being formed in the near future and a uniform prescription list adopted for first quality work, which would increase prescription prices in some instances."

A new prescription price list for lenses was submitted by Consolidated Optical in June, 1936, to a meeting of most Ontario wholesalers for discussion with a view to their acceptance of it. Discussion apparently centred on the refusal of Consolidated to grant a price differential to small wholesalers or to eliminate the "Big Dealer" discount for prescription work. In the result, most of the wholesalers were willing to accept the proposal but agreement was not reached, at least on that occasion, because Bausch & Lomb refused to accept it owing to resentment at not being consulted in advance by Consolidated. Atkinson, sales manager of Consolidated, is quoted by a Bausch & Lomb official as having stated "that Consol had taken the brunt of this whole affair and that they are expecting the rest to follow or else they will have to take some other measures to retain their business."

An agreement on prescription lens prices was reached in March, 1937, at a meeting in Toronto attended by almost all Ontario wholesalers, Consolidated Optical, Imperial Optical, Bausch & Lomb, Kahn Optical, Sterling Optical, Crown Optical and H. & M. Optical. The agreement covered both "corrected" and "non-corrected" lenses. Bausch & Lomb was the prime mover in these

arrangements; although not handling lenses except at Centex prices or higher, it was naturally affected by low Celex prices. Writing Maritime Optical of Quebec, P.Q., on March 22, 1937, Amsden of Bausch & Lomb said:

"... the adoption of such a programme by both the Quebec and Ontario wholesalers will. . . . enable the wholesalers in both provinces to work on the common cause, viz., the stabilization of Rx. prices across the Dominion of Canada."

These arrangements and concurrent arrangements by Quebec wholesalers broke down after a few weeks because of failure by a few wholesalers to observe the terms agreed upon.

No attempts to reach general agreement on single-vision lenses are recorded between March, 1937 and the spring of 1939. Some witnesses ascribed the reason to strained relations between the two largest wholesalers, Consolidated and Imperial, and to general lack of confidence in the possibility of persuading some smaller wholesalers to observe any agreements reached. Some arrangements continued to exist respecting at least some such lenses, as is indicated, for example, by a letter of February 27, 1939, from the manager of Consolidated to his Moncton branch in which, referring to a reported sale of Celex Cruxite (tinted) by Maritime Optical at about 95c less than Consolidated list, he stated:

"I . . . immediately wrote Maritime on the matter. There is no reason in the world for them to offer these lenses at a cut on our price and we'll have it stopped."

This was, however, an exceptional instance and all witnesses agree that vigorous competition continued to exist in "non-corrected" single-vision lenses, modified only slightly by temporary or special arrangements from time to time, such as those described above.

Even more vigorous and indeed bitter competition existed in fused bifocals. A number of efforts were unsuccessfully made prior to 1939 to bring all wholesalers up to Consolidated's prescription list price of \$2.70 for the finished lens, which sold at retail for from \$7.00 to \$10.00 (not including frame or mounting). Wholesalers could obtain rough blanks for these bifocals from Consolidated at prices as low as 66c in 1937-1938, and as low as 45c from other sources, and could obtain semi-finished blanks as low as \$1.00. After performing finishing operations, some wholesalers sold these lenses as low as \$1.25 for the finished lens ready for mounting. Prices of from \$1.50 to \$1.75 were common in the Montreal area.

On October 31, 1938 the following wholesalers in the province of Quebec signed an agreement agreeing to maintain the price of \$2.70 effective November 6: Maritime Optical, National Optical, Butler Optical, Commercial Optical, Central Optical and Canadian Optical Service. The agreement was also accepted by Toronto wholesalers, including, of course, Consolidated and Imperial. New price lists were issued by almost all wholesalers.

The agreement, however, lasted only two or three weeks. Central Optical of Montreal reverted to a price of \$1.75 and the others rapidly followed suit, at least in the province of Quebec. Writing to his Canadian manager in November 26, with reference to the new low price, C. O. Cozzens, then president of American Optical, said:

"My opinion is that we should meet it, and when I say 'meet it', I mean the \$1.50-2.00 price if that is what the Central Opt. Co. is going to, and do it very promptly."

R. F. Reid, then Canadian manager, replied on December 3:

"Competition is very keen; the field is limited, and everybody seems to be trying to break off some of the business, but they have a very hazy knowledge of anything, except going out to get business, and the only weapon they apparently know is price, they talk price, cut price; about every bad practice that could be exercised seems to be used in that territory . . . we are going into a competitive

situation on these low priced bifocals. We were in it before, and we discontinued it when the other jobbers decided to discontinue their low price fused. We are going over it very carefully."

Writing to his Montreal manager on November 23, Reid had said:

"The next few days will tell the story, we will let them go in and make it strong enough that if we had to cut the price we'll cut it low, and let them shout about it, and believe me, they aren't coming back with any more meetings, to waste time and waste argument, when they do not respect their name on any agreement . . . we will give consideration to your suggestion of cutting it to \$1.25 and \$1.75."

8. General Relations among Wholesalers

Relations of wholesalers with each other prior to 1939 were not such as to facilitate any workable agreement amongst them. In particular, Consolidated and Imperial Optical had virtually no business relations with each other and were barely on speaking terms. Consolidated Optical had refused to supply goods to Imperial Optical, Central Optical or Commercial Optical of Montreal, or to Hudson Optical of Vancouver, because of their failure to fall in line completely with Consolidated's pricing policies.

V. INTRODUCTION OF THE NUMONT FUL-VUE PLAN

1. Nature and Purpose of the Plan

As has been indicated in chapter IV, the American Optical Company had succeeded during the period prior to 1939 in licensing all leading manufacturers under Numont and Ful-Vue patents, thereby eliminating competition at the manufacturing level over a substantial part of the output of frames and mountings. This system of patent licensing of manufacturers would of itself have had much less significance if the company had not proceeded with a plan to extend its control, based on these patents, to all levels of distribution.

Devised early in 1939 the Numont Ful-Vue licensing plan was designed to establish control of prices for both wholesale and retail distributors. Consolidating and extending previously existing methods of control, the new plan would, it was hoped, induce other wholesalers to subscribe to an enforceable scheme which would eliminate price competition amongst wholesalers in selling principal lines of frames. Together with related arrangements, it would reduce competition in wholesale prices of prescription lenses. By establishing minimum prices to be charged the public for completed spectacles of practically all types in popular demand, it would restrict competition among retailers and thus assist the maintenance of fixed prices at the wholesale level.

More specifically the "Plan" involved the following aspects:

(1) Wholesalers and retailers would receive licences to sell the Numont mounting and the already well established Ful-Vue spectacles. One single and indivisible licence was necessary for these and also for certain less important mountings incorporating patented straps such as "Diaflex", "Triflex" and "Duflex";

(2) The wholesale and retail licences would require observance of uniform minimum prices at each level of distribution; manufacturers' prices were already controlled by the manufacturing licences;

(3) Prices would be set not only for frames and mountings but also for prescription lenses which might be sold with them to retailers or to consumers;

(4) Manufacturers, under manufacturing licences described in chapter IV, would be required to sell the patented frames and mountings only to licensed wholesalers and retailers; wholesalers, under the new licences, could sell at wholesale prices only to licensed retailers; and retailers could sell only to consumers;

(5) Retailer solvency and support of the "Plan" were to be ensured by guaranteeing high margins between wholesale and retail prices, by reducing retail competition, and by limiting licences to qualified dispensers;

(6) The "Plan" would be administered and enforced in Canada by Numont Ful-Vue Corporation, a wholly-owned American subsidiary of American Optical, formed solely for the purpose of granting licences under patents on optical goods.

In letters inviting Canadian wholesalers to attend the introductory meeting held at Montreal on March 10 and 11, 1939, J. W. Curry, first manager of Numont Ful-Vue Corporation in Canada, stated:

"The plan includes provisions which we feel confident will result in the stabilization of the marketing of these patented items, and can be made to produce some very constructive results in a number of other directions. . . . We believe that the program that will be presented at these meetings will be looked upon as affording the means to accomplish some very beneficial results for both the Distributors and the Retailers. . . ."

Writing on February 15, 1939, to one of his branches, R. F. Reid, manager of Consolidated Optical, remarked:

"Steps are being taken to remedy all the abuses, whether by wholesaler or retailer, as well as to do something that will benefit the whole trade."

Consolidated's sales manager, C. J. Atkinson, wrote the Ottawa branch on June 9:

"The opposition do a certain amount of knocking, and state it is A. O. Co. that is raising prices, and I want you to get this thoroughly in your mind — that this new set-up was gotten out to help the retailer as well as ourselves, to eliminate certain conditions that are bad and are pulling the whole profession down, and, what is pulling the profession down? — it is because of competition and cutting prices. The average man would sell a frame, and maintain a price, only that a fellow around the corner sells for less, and the result — he has to lower his price to meet competition, and then somebody still cuts lower, and it gets to a point where there is no profit, and it is this condition we are trying to correct, and if the whole trade could realize the benefit of the new set-up, and was familiar with it, and when they do they will think it is 100 per cent perfect. In fact, some are getting so enthused that they want the lens schedule in right away, this is true in Toronto and in the west, and wonder why we cannot cut out all Celex entirely, and not control the Conventional (*sic*) lines, of course we do not intend to do that, that is going too far, you have to have competition, and lower priced merchandise to meet the prices the people are prepared to pay.

My thought in writing you this, and explaining all this is to get the idea behind it — it is a wonderful thing, it is for the retailers, to give them a profit, so in turn they can pay their accounts. As you know at present many are having difficulty in financing, and the reason — they are not making sufficient profit, competition is too keen, and what we are trying to do is to give them something to show a profit, and with which they will not be afraid of competition."

2. Montreal Meeting, March 10-11, 1939

At this meeting Canadian wholesalers were given a broad outline of the plan by C. O. Cozzens, vice-president of American Optical Company, Southbridge, Mass., A. K. Marsters, secretary of Numont Ful-Vue Corporation and an officer of American Optical, J. W. Curry, Canadian manager of Numont Ful-Vue, and other officials of American Optical. All Canadian wholesalers were directly or indirectly represented, with the possible exceptions of United Optical, Sherbrooke, P.Q., K. & W. Optical, Kitchener, Ontario, and Champlain Optical, Quebec, P.Q. Copies of the proposed licences and of the proposed price schedules for frames and mountings were shown to those present and were discussed at length. Those present were made to realize that, after the effective date of the plan, then proposed as April 1, they would not be permitted to buy or sell the popular frames and mountings covered by the licence unless they had signed it and agreed to be bound by its terms.

The price schedules for frames and mountings were established for most lines on what is known as a "five-column" basis for wholesale prices, including a price for prescription sales and four prices for stock sales, depending on the quantity purchased. For example, the wholesale prices proposed for standard Ful-Vue gold-filled frames were as follows:

Rx.	2, 3 or 4 (1 style or colour)	5 of a kind or 10 assorted	25 assorted	50 assorted
\$3.35	3.10	3.00	2.70	2.40

The stock prices, furthermore, were to be subject to a further possible discount of 5 per cent or 10 per cent. If a retailer's total purchases during a year from one wholesaler amounted to more than \$5,000 (including prescription sales, but not equipment), that wholesaler could at the end of the year rebate 5 per cent of the value of stock sales during the year; on purchases of \$10,000 a discount of 10 per cent was allowed. Thus the lowest net price possible in the above example was \$2.16, compared with a non-manufacturing wholesaler's cost of \$2.00 for a frame made by Consolidated Optical in Canada, and \$2.08 at that

time for an American-made frame laid down in Canada. The minimum price to the consumer for such a frame without lenses would be \$7.50. American Optical officials informed the meeting that a similar pricing and discount policy would be adopted by Consolidated Optical for all goods, and that the previously existing "Big Dealer" discount, already described, would be discontinued.

All wholesalers, except of course Consolidated Optical, objected strongly to the 5 per cent and 10 per cent discount proposal. In reporting to his parent company on the results of the Montreal meeting, L. E. Amsden, Canadian manager of Bausch & Lomb, wrote on March 14, 1939:

"These rebates of 10 per cent and 5 per cent were strongly objected to by all jobbers present inasmuch as it did not give them an opportunity to secure any margin of business they have now been enjoying with the large retailers, and there were few accounts in Canada who could purchase the maximum amount of \$10,000 from more than one wholesaler."

Writing on March 25, 1939, to National Optical, Amsden stated:

"... I agree with all other wholesalers that the 10 per cent and 5 per cent rebate being an impossible proposition to accept and to be competitive with Consol in Canada."

American Optical, however, did not agree to remove or modify this feature of the plan.

Liveliest debate at the meeting arose respecting prices to be charged for prescription lenses used with any patented frames and mountings. The licence gave Numont Ful-Vue Corporation the right to prescribe the "quality" of such lenses and pledged the wholesaler to refrain from selling lenses of lesser quality for use in such spectacles or from selling complete spectacles below any minimum prices prescribed, which prices would include "the prevailing prices for the quality of lenses specified." Apparently sample schedules of lens prices were not presented to the meeting. Rather an attempt was made to reach agreement on prices for the standard lower-priced lenses—fused bifocals and "non-corrected" single vision lenses.

All present agreed to adopt a price of \$2.70 for fused bifocals in licensed products and also agreed to a price of \$2.00 for the same lenses in non-licensed products. Amsden, in his report of March 14, stated:

"Lately, Fused Bifocals have been supplied by Quebec wholesalers on Rx. work at prices as low as \$1.50 per pair and there has been evidences of this \$1.50 price spreading into Ontario."

With reference to single vision lenses, Amsden added:

"The meeting could arrive at no agreement whatever as to a suitable wholesale Rx selling price for single vision lenses fitted to Numont or FulVue products. Single vision lenses are being sold today by Quebec jobbers for as low as \$.45 per pair for spheres and \$.70 per pair for compounds, inserted or mounted, while in Ontario the wholesalers get fifty per cent higher prices even on Celex Rx work. Arthur Jobin of the Central Optical Company deadlocked the final meeting till long past the closing hour by refusing to make any change whatever in single vision prices."

The wholesale lens schedules later issued, effective June 5, 1939, provided that licensees should not use with the licensed frames and mountings "lenses inferior in quality to those selling on prescription at the prices listed herein." These schedules incorporated Consolidated's prescription list prices for substantially all lenses. For "non-corrected" single vision they adopted Consolidated's Centex prescription list, resulting in minimum prices for lenses in the lowest powers of \$1.65 for spheres and \$2.15 for compounds. Thus the low Celex prices cited by Amsden in the above quotation could no longer be charged for lenses used with licensed products.

3. Form of Wholesaler's or Distributor's Licence

The licences signed by all Canadian wholesalers at the time of the Montreal meeting, or within the following eight weeks, contained five recitals and nineteen long clauses. The licences were not all identical in form and some were modified by supplementary agreement. Subject to the qualifications mentioned below, all licences included the following features:

(1) Numont Ful-Vue Corporation granted a personal and non-transferable licence to assemble and sell frames and mountings covered by the patents and trade marks. See Appendix I.

(2) Wholesalers agreed to sell frames and mountings, with or without lenses, "only at the prices and discounts and under the terms, sales plans and sales regulations" fixed by schedules to be issued by Numont Ful-Vue Corporation; this obligation was to be effective not only for the term of the licence but also "at all times with respect to the articles . . . howsoever or whensoever the same . . . may be acquired . . ."

(3) Wholesalers agreed to sell only to consumers or licensed retailers or wholesalers, and to buy only from licensed wholesalers or manufacturers.

(4) Wholesalers agreed "never to contest the validity" of the patents. In some of the licences this obligation also was specified as not being affected by any "termination or cesser" of the licence. The licence also gave Numont Ful-Vue an option to buy from licensees any improvement inventions made by them on the patented inventions.

(5) Wholesalers agreed to permit Numont Ful-Vue or its agents to audit their books to determine whether any violations of the licence had occurred. If any violation were proven in any court Numont Ful-Vue could collect liquidated damages of \$1,000 for each and every violation and could also obtain injunctions to restrain breaches of the agreement.

(6) The licence could be terminated by Numont Ful-Vue on thirty days' notice with or without cause, or, under most of the licences, by the wholesaler on three months' notice. In most licences the termination clause specified that the wholesaler would then be relieved from "any and all obligations and admissions contained herein".

(7) No royalties were payable by the licensees.

4. Execution of the Wholesalers' Licences

Of the twenty-two wholesale licences then issued, twelve were signed by the wholesalers on the last day of the Montreal meeting or within a week thereafter. The "hold-outs" consisted of the largest and most aggressively competitive "independent" wholesalers, namely, Maritime Optical of Quebec; Central Optical of Montreal; Commercial Optical of Montreal; and the Imperial group of companies, including National Optical. One small wholesaler, United Optical of Sherbrooke, P.Q., did not sign until late in April.

Numont Ful-Vue did not acquire all its patent licensing rights until after the Montreal meeting and did not itself sign most of the licences until the middle of April, 1939, or later.

Maritime and Commercial did not sign until the last few days of March, after having found from United States manufacturers that supplies of Ful-Vues and Numonts would not be available from them unless they were licensed. Their licences differed from the earlier licences only in that they did not extend to two of the supplementary Ful-Vue patents.

An officer of one wholesale company stated in his evidence:

"They were very decent when they came in and they talked very openly and business-like and they tried to show us all the advantages of falling in line and signing the

contract . . . we independents discussed the situation and the way we were to be if we did not accept, because the companies, the owners of the Ful-Vue Corporation had all the manufacturers signed up . . . Finally, with a smile, they said to us: 'What will happen if you do not get any goods because you have no licence'; or, 'you know what the fashion is and you have got to follow suit'. If you did not get the stuff, you would have to close up the doors and liquidate . . . But I said to them: 'Your contract, your patent, is no good in Canada, and to make it good we have got to sign your contract'. That was the exact moment they chose to tell us: 'Will you have the goods or not', because I found the flaw in their whole set-up . . . Anyone who wanted to start a fight, we could do so; but even if we start a fight, the American Optical Company is the biggest producer in the States and all the other manufacturers are tied up. The moment that our names are erased from the list of distributors, we cannot get the goods . . ."

Evidence of another wholesaler included the following:

"Q. Why did you sign that agreement?

A. There was no alternative . . . If I had not signed this, I would not have been able to buy any goods . . .

Q. Did you have to have a type of goods covered by the Numont Ful-Vue licence in order to continue in business?

A. Absolutely.

Q. That was because of the public demand for that type of goods, was it?

A. . . . the fashion element entered into the optical business and whereas previously people were somewhat reluctant to wear glasses, now they wanted to make themselves dignified or look more beautiful by wearing glasses and it naturally helped a lot to use this Numont stuff . . . after the optician found out that he could easily obtain \$20 to \$25 for a pair of glasses, there was no demand for any other stuff than that type of merchandise."

5. Imperial Optical Company

Percy Hermant, president of Percy Hermant Limited, whose optical business was operated under the trade name of Imperial Optical Company, by far the largest independent wholesaler in Canada, did not sign the wholesale licence on behalf of his company and its affiliated companies until April 15, 1939, more than a month after the Montreal meeting. During the intervening period several conferences were held between Imperial Optical and American Optical officials.

Hermant at the time objected generally to the restraints imposed by the plan on his freedom of action in buying and selling and feared especially that further developments of the plan might affect seriously his sources of supply of frames and mountings. He succeeded, however, in protecting his position slightly by obtaining concurrently a non-exclusive manufacturing licence from American Optical under the Ful-Vue patents, permitting him to manufacture standard gold-filled Ful-Vue frames and mountings. His manufacturing licence, essentially similar to that granted most United States manufacturers, authorized sale in Canada, the United States and most foreign countries, except France and the United Kingdom.

Imperial Optical's strong bargaining position enabled it to secure other concessions and special agreements, including:

(1) Permission to dispose, at special prices well below schedule prices, of over 700 Ful-Vue gold-filled frames and nearly 2,500 white metal Ful-Vue frames which Imperial had imported from Germany.

(2) Provision that Numont Ful-Vue Corporation could terminate its licence only "with cause", whereas all other licences permitted termination "with or without cause".

(3) Special contract limiting to \$5,000 the total damages which could be claimed by Numont Ful-Vue at any one time from all the Hermant companies, contrasting with \$1,000 for "each and every violation" applicable under other licences.

6. Central Optical Company Limited, Montreal

Central Optical, owned and operated by Arthur Jobin, had built up a substantial wholesale optical business, consisting largely of sales of low-priced goods to small retailers. Most of his business was done in the smaller towns and villages of Quebec and the Maritimes, although in years immediately prior to 1939 he had developed some business in Western Canada.

Jobin's insistence on competitive pricing had been, prior to 1939, the principal obstacle to firm agreements being reached among wholesalers in his area who wished to increase prices of lenses. He had also developed several lines of low-priced frames and mountings. During the year prior to the Montreal meeting he had imported from Germany over 15,000 gold-filled end-pieces of Ful-Vue type to which he fitted unpatented temples, and was under contract to buy 45,000 more. He had also obtained from Germany over 3,000 gold-filled and white metal Ful-Vue frames. As a result of his failure to observe recognized prices for optical goods, Jobin had been cut off the A.O. Co. list in January, 1939.

Since the Numont Ful-Vue plan would compel him to discontinue sales of the German Ful-Vues and would compel him to raise substantially his prescription prices for lenses used with patented goods, Jobin objected strenuously to the plan. His attitude was described in a letter of March 31, 1939, from J. A. LeBer of National Optical (a subsidiary of Imperial) to Amsden of Bausch & Lomb:

"To my mind the main objection coming from Jobin is that he wants to be free to sell F.V. and repair lenses to small jewellers located in the 'bush' country. You know that Jobin's business is coming mostly from that source but Stewart [American Optical] was not ready to grant him anything of the kind."

Amsden replied on April 6:

"Jobin's request to sell the small jeweller in the bush country at a special price could not be tolerated as it would immediately tear down the whole plan, which plan is primarily to establish a uniformity of price from the manufacturer to the consumer."

Jobin made his objections known at the Montreal meeting and at later conferences in March and early April. During April he visited the United States in an unsuccessful search for sources of supply. He found that he could not get the goods unless he signed the licence. In the meantime, Consolidated Optical continued its refusal to sell any goods to Central Optical.

Jobin finally capitulated and signed the licence on behalf of Central Optical on May 13, 1939; he was the last of the wholesalers to sign. Before doing so, he signed on May 12 a contract with Consolidated Optical, Numont Ful-Vue Corporation, and American Optical, arranging for disposition of the German Ful-Vues on hand or on order. Under the contract Central turned over to Consolidated about 2,000 Ful-Vue frames. These were then sold by Consolidated under a special schedule issued by Numont Ful-Vue on July 1, authorizing a prescription price of \$1.75 for the gold-filled frames and \$1.25 for the white metal frames, compared with the newly established price of \$3.35 for the standard gold-filled Ful-Vue frame. Central was permitted to retain the German Ful-Vue end-pieces and to sell them and any others received under its existing contract with its German suppliers, but subject to four conditions: (1) Central must use with the end-pieces temples made by Consolidated; (2) It must sell the resulting mountings at not less than the regular Numont Ful-Vue minimum prices; (3) It must pay royalties of eight cents per pair to American Optical; (4) It must not import any unlicensed goods beyond the original quantity of 60,000 end-pieces.

Central Optical was of course unable to obtain further deliveries from Rapsch, its German supplier, after the outbreak of war. Concerned even with the post-war situation, Gilman Wallace, senior attorney of American Optical, wrote Jobin on November 20, 1940:

"You are instructed to have no further correspondence with Rapsch relating to your contract at this time or after the termination of the present war without first

submitting such correspondence to us for approval and in no event shall you make any admission or suggestion that your contract with Rapsch be continued in force and effect."

German goods held by Central were doubtless the principal goods referred to in a letter of March 21, 1939, from the late C. O. Cozzens of American Optical to Butler Optical, Montreal, in which he said:

"The reason for this delay [in the introduction of the plan] is the existence of certain merchandise in Canada which, as you undoubtedly know, would cause considerable harm to the Canadian market if it is not disposed of properly . . . This delay is consistent with our purpose to correct as much as we possibly can the present unfair trade conditions in the Canadian market."

7. Bausch & Lomb Optical Co. Ltd.

Bausch & Lomb favoured the Numont Ful-Vue plan and was one of the earliest signatories. Reporting to his board of directors, Amsden of Bausch & Lomb, wrote at the end of 1938:

"Certainly, B. & L. in Canada are prepared to subscribe to such a policy if it will have any control of the selling prices of quality products both in merchandise and prescription form . . ."

Later, on March 31, 1939, writing a wholesaler in eastern Quebec, he said:

"The main reason that we are in favour of the Numont Ful-Vue policy is that the product will be controlled from the manufacturer to the consumer. . . ."

Amsden, however, as already indicated, objected strongly to the 5 and 10 per cent discount, and signed the licence on March 11 with the understanding on his part that American Optical would later discuss the matter with his parent company and reach a settlement. With reference to this, R. S. Ingram of Bausch & Lomb wrote on June 21, 1939, to an official of Bausch & Lomb Optical Co. of Rochester, N.Y.:

"We could not agree to any such stipulation for it meant that a retailer with a potential buying power of \$5,000 or \$10,000 would naturally have to confine his buying to one house—which would not likely be us, for the Consolidated have branches all over the country. . . . Now, the Consolidated have agreed with us, and Southbridge [American Optical] have agreed with Ben Ramaker [B. & L., Rochester], that they will not object if we . . . allow the 5 per cent or 10 per cent discount to any account who can qualify for the discount with them. In this way, we may give a 5 per cent or a 10 per cent discount to buyers who may only give us \$2,000, \$3,000 or \$4,000 for over a year, but at the same time, qualify with \$5,000 or \$10,000 purchases from Consolidated."

Reporting to his board of directors on October 12, 1939, Amsden said:

"Not only are the retailers who do not qualify for this rebate opposed to this part of the Ful-Vue Policy but also the independent jobbers who feel that the American Optical Company are attempting to eliminate all wholesalers but the Consolidated Optical Company from doing any business with some thirty or forty retailers across Canada. It is naturally impossible for these men that qualify with Consolidated Optical Company for either this ten or five thousand dollars annually to still give any worthwhile business to the other jobbers. B & L have opposed this part of the policy and have told Curry of the Numont Ful-Vue Corporation that American Optical Company should eliminate these preferred discounts. B. & L. acting under instructions from Rochester advised the retail trade providing the retailer qualified with any one wholesale for either the ten or five thousand dollar respectively that on the amount of their purchases from B. & L., we would give him the same rebate at the end of the year as the Consolidated Optical Company."

Other wholesalers not unnaturally objected to this exception to the rules. Complaints were made, for example, by Imperial Optical to Numont Ful-Vue Corporation. As a result, Amsden discovered that he and Ingram had apparently misunderstood the situation and that in fact no special arrangement existed with American Optical. As a result, Bausch & Lomb claims it discontinued the special practice about the end of 1939 and reverted substantially to observance of the discount plan as prescribed by the schedules to the licence.

8. Supplementary Meetings of Wholesalers, May-September, 1939

Besides the meetings already described at which licences were signed by wholesalers, several meetings were held by the Montreal and Toronto wholesalers respectively between May and September, 1939. We have record of six such meetings in Montreal and three in Toronto. They were apparently called by the wholesalers themselves to discuss and agree upon interpretation and application of the Numont Ful-Vue licences and to form agreements supplementary to the licences.

One of the first meetings at Montreal, held on May 4, was attended by representatives of Butler Optical, National Optical, Central Optical, and Consolidated Optical. Although minimum wholesale lens price schedules were not issued and made compulsory by Numont Ful-Vue until June 5, these wholesalers voluntarily agreed at this meeting to observe after May 8 minimum prices for prescription lenses fitted in patented frames or mountings. They agreed that "Super Centex lenses or their equivalent would be the cheapest lenses" used for that purpose and that they would follow Consolidated's price list, including, with a few exceptions, Consolidated's list of charges for special shapes and services. Similarly, they agreed to charge, for fused bifocals used in patented goods, minimum prices of \$2.70 for spheres and \$3.20 for compounds.

Although Jobin of Central Optical did not sign his licence until May 13, he accepted the agreements reached and indicated that beginning May 4 he would discontinue sale of German Ful-Vues at special prices and would thenceforth observe Consolidated's prices.

Other meetings followed much the same pattern. A somewhat larger meeting, attended by all Quebec wholesalers, was held on May 19, when it was agreed that effective June 5 they would sell with patented goods no single vision lenses inferior to Super Centex grade. This agreement proved technically unnecessary since it specified only what was later required by the licence schedules. It was reached, however, before the schedules were issued and indicates the voluntary basis of the licences, so far as many wholesalers were concerned. The Quebec wholesalers then sent out jointly a mimeographed circular telling customers of the decision.

Other meetings of the five Montreal wholesalers were held on May 29, August 7, August 28 and September 18. Lens prices, interpretation of the lens price schedules, and alleged violations served as subjects of discussion. The minutes of August 28 show, for example, that Central Optical was taken to task for selling unpatented gold-filled centres with Ful-Vue rimless mountings at less than 60 cents and agreed to discontinue this practice. The schedules listed no minimum price for such centres, the rule being merely that no indirect price cut could be made affecting the price of patented parts.

In the meantime, similar but less frequent and apparently less contentious meetings were held by Toronto wholesalers. At a meeting of May 4 they agreed on prices for complete Numont spectacles to retailers for their personal use, although no schedule to this effect was issued by Numont Ful-Vue until July 1. At meetings of May 19 and June 9 interpretations of the licence schedules were discussed.

9. Form of Retailer's or Dispenser's Licence

As originally planned, the retailer or dispenser licence issued by Numont Ful-Vue Corporation was intended to follow closely the pattern of the wholesaler licence. As finally settled it departed from that precedent in having no covenant regarding validity of the patents and in having no enforcement provisions other than the power to cancel the licence, and it added a clause which might serve as a basis for an injunction against a licensee who violated his licence. Writing

his Winnipeg manager on April 17, 1939, R. F. Reid, then manager of Consolidated, said:

"...the dispenser's licence has been changed a lot. They have taken a lot of teeth out of it, which might make it difficult for a dealer to consider, especially some of the larger ones. For one thing, they have taken out the penalty clause. They have also taken out the clause referring to examination of the books and practically [all] that is left now is that here's an agreement and if a fellow signs it, he can either give notice and cancel it or it can be cancelled on him."

The licences, made partially effective on September 5, 1939, and fully effective on October 4, were signed in the spring and summer of 1939 by almost all Canadian optometrists, opticians and dispensing oculists or physicians. It consisted of a two-page printed document containing five recitals and eleven clauses. All licences were identical and included the following features:

(1) Numont Ful-Vue Corporation granted to the retailer a personal and non-transferable licence to assemble and sell to consumers frames and mountings covered by the patents and trade marks. See Appendix I.

(2) Retailers agreed to sell assembled frames and mountings at prices and terms no more favourable to the buyer than those fixed by schedules to be issued by Numont Ful-Vue.

(3) Retailers agreed to sell only to consumers and to buy only from licensed wholesalers or manufacturers.

(4) Retailers agreed not to sell with the patented articles lenses inferior in quality to those specified by schedule to be issued by Numont Ful-Vue. They agreed to sell "only at prices which will include, in addition to the minimum prices for the mountings,... the prevailing prices for the quality of lenses specified."

(5) Retailers were not permitted to manufacture the patented goods or sell to other retailers or to wholesalers.

(6) The licence could be terminated by Numont Ful-Vue on ten days' notice with or without cause and by the retailer on thirty days' notice.

(7) No royalties were payable by the licensees.

10. Introduction of Retail Licences

Although American Optical Company had apparently hoped to make the retail licence effective shortly after the effective date of the wholesale licence, the desire to get as many licensees as possible before making the plan operative, together with difficulties in working out some details of the plan and in obtaining the signatures of some groups of dispensers, resulted in postponement of the effective date until October 4, 1939. Writing to J. W. Curry, Canadian manager of Numont Ful-Vue, on May 3, 1939, W. A. Stewart, an official of American Optical, stated:

"... you should have a considerable number of your dispensers licensed before you attempt to put these prices into effect. You also should have an opportunity to talk this out thoroughly with every wholesaler, let him see a copy of the proposed prescription schedules, and get the job organized before you just shoot through with a schedule at him."

Making use of the wholesalers' natural desire to have all their customers licensed in order that they might sell to them, Numont Ful-Vue delegated to them the task of canvassing optometrists, opticians and oculists to become licensees. Each wholesaler was supplied with printed application forms to be signed by the applicants for licence. The application was then certified by the

wholesaler and sent by him to Numont Ful-Vue. Wholesalers were instructed on May 27, 1939, that:

"No dispenser will be acceptable as a licensed Numont Ful-Vue dispenser who does not conform to the following formula:

1. Dispenses only legalized prescriptions.
2. Does not indulge in bait advertising.
3. Does not engage in unethical practices.
4. Has credible (*sic*) business or office premises.

No retailer who does not conform to the above formula is to be licensed, and we ask that you make it your responsibility to see that only such accounts as conform to the above formula are recommended by you or by your salesmen."

Prospective licensees were not informed at this time of the minimum retail prices proposed to be established for frames and mountings and for lenses. Numont Ful-Vue merely stated that "such schedules when issued will be fair and reasonable, and will fix only the *minimum* price."

Although the wholesale licences were, after June 5, fully operative so far as minimum wholesale prices were concerned, wholesalers were not restricted as to the retailers to whom they might sell until the great majority of retailers had been licensed. After September 5, sales could be made only to licensed retailers. Immediately prior to that date a list of approximately 1,800 retail licensees was distributed to wholesalers, and amendments to that list were made from time to time during succeeding years.

11. Opposition to Retail Licensing

The documentary evidence does not indicate any general or widespread opposition to the licences by optometrists and opticians. Generally speaking, retailers appear to have accepted the licence both because they felt they had to do so in order to handle the very popular patented goods, and because they felt the plan would assist them in maintaining retail prices. Initial opposition did arise, however, from the following sources:

- (1) The Association of Optometrists and Opticians of the Province of Quebec;
- (2) H. Barlow, of Montreal, and Superior Optical Company, of Toronto, two of the largest opticians in Canada;
- (3) A few doctors who felt that the licence provisions might conflict with their professional tenets;
- (4) A few optometrists who disliked the basis on which volume or quantity discounts were permitted on wholesale sales.

12. Quebec Association of Optometrists and Opticians

This Association was later incorporated in 1940 as the College of Optometrists and Opticians. Despite its name it includes no practising opticians, who have their own association known as the Corporation of Dispensing Opticians. Soon after wholesalers began the canvass of optometrists and other prospective licensees, the secretary of the Association, J. H. L. Hebert of Montreal, sent printed cards to all members referring to the licensing program and asking them "not to do anything until a special general meeting is called".

Mr. Hebert in his evidence stated:

"They [the members] were very much against it [the licence] because they felt they were being put into a corner and told: Here, you sign or you do not get any merchandise. . . . we found that we were up against it and we had to sign or do without the goods. So we reluctantly signed the thing . . .

. . . The lenses were affected as well; that is why we objected . . . one of the clauses mentioned was that we must use a certain quality of lens in the frame. We thought they were going a little too far.

. . . We objected to signing anything that was trying to establish a fixed price, because we felt we were not selling merchandise and that by fixing a price like that meant that our customers were always on the same footing; some were poor people while some could afford to pay the fixed price; others could not."

J. W. Curry, manager of Numont Ful-Vue, immediately held several conferences with officials of the Association, culminating in meetings on June 6 and June 21, 1939 at Montreal. C. O. Cozzens, then vice-president of American Optical, went to Montreal for these meetings. As a result, the optometrists agreed to accept licences. Writing to the general manager of Consolidated Optical about the meeting, W. C. Coffin, Montreal manager, said on June 23:

"As you will note, although the Optometrists are on principle (*sic*), in favour of the contract, they object to being forced to sell quality lenses, and they are also kicking on the 25c. charge for exchange."

Following the meeting Curry wrote to Quebec wholesalers:

" . . . we were engaged in numerous conferences with the Optometric Association of Quebec. These negotiations are now completed and the Optometric Association has taken upon themselves the task of sending to its various members the actual licences for members' signature."

Curry, however, was apparently under a misapprehension, since on July 22 he wrote to the secretary of the Association, referring to continued reluctance of some optometrists to sign:

"As I understand the situation now, the Optometric Association of Quebec is neither recommending nor objecting to having its members sign Numont Ful-Vue Licences . . . In as much as the Association originally instructed its members not to sign and we have gone to extreme lengths to overcome the objections . . . it seems only fair to me that you should inform your members in some way that the objections of the Association no longer stand."

Although no further action was apparently taken by the Association, Numont Ful-Vue succeeded, with the assistance of the wholesalers, in signing up almost all Quebec optometrists in the next few months. That some optometrists continued to be at least only lukewarm toward the plan is indicated in a letter of October 5, 1939, from J. E. Valentine of Maritime Optical to Curry:

"Before your retail price list is officially sent out I would advise you to consult the Montreal retailers, because they find this set-up much too high."

Curry had already done this, having been in Montreal on August 22 "to discuss the minimum price list with the secretary of the Association and six of the directors. The prices that Jerry [Curry] submitted were found very reasonable". This is from a letter which Coffin of Consolidated in Montreal wrote to Reid of Consolidated in Toronto on August 23. Shortly before this meeting the Association had passed a resolution, which was not acted upon, to complain to the Combines Investigation Commission respecting the plan.

When asked what "extreme lengths" Numont Ful-Vue had gone to in order "to overcome the objections", Hebert made specific reference to payment by Numont Ful-Vue or American Optical of lawyer's fees of about \$250 incurred by the Association in the negotiations.

13. Patent Impeachment Action by H. Barlow, Montreal

Barlow was and still is the second largest optician in Montreal and one of the half dozen largest opticians in Canada. Barlow strongly objected to the Numont Ful-Vue plan because he thought it would limit his freedom of action and would compel him to charge higher prices for some lenses than he had been accustomed to charge. He also felt that the Ful-Vue patents were invalid on the ground that the Ful-Vue or high-mounting feature had been known and had been in use in the trade long before the patents were applied for. This impression was confirmed by an opinion he obtained from a well-known firm of Canadian patent attorneys in June, 1939. Accordingly he refused to accept a retail licence.

Finding it progressively more difficult to obtain supplies of patented frames and mountings. Barlow, on October 2, 1940, launched an action in the Exchequer Court of Canada against Ful-Vue Sales Company, of Washington, D.C. for impeachment of the first or basic Ful-Vue patent. George P. Kimmel, a partner in Ful-Vue Sales Company, visited him in the week of October 23 and arranged a settlement whereby Barlow, in return for \$3,300, withdrew his action. He also received \$3,300 more for a patent application which he owned but which was of doubtful value in itself. Barlow then accepted a retail licence, but on the specific understanding on his part that he could continue to charge less than the prescribed minimum prices and could give special discounts on a wider basis than was permitted by licence schedules. Numont Ful-Vue denied the existence of any such special arrangement.

14. Proposed Patent Impeachment Action by Superior Optical Company, Toronto

A comparable case, differing only in that impeachment action was merely threatened and not actually instituted and in the amount of money involved, arose at the same time in Toronto. Frank A. Elliott, principal partner in Superior Optical Company, then the largest firm of opticians in Toronto, had refused to take out a Numont Ful-Vue licence, objecting to the restrictions imposed regarding retail lens prices and regarding discounts which could be given to special classes of customers. Despite absence of a licence, he was able to get Ful-Vue goods indirectly, including large quantities from "a fellow [who] used to come around with a couple of suitcases . . . he would carry two or three thousand . . . and would sell you all you wanted. . ."

By October, 1940, Elliott had found it more difficult to get supplies and told an official of American Optical early in October that he planned to take action to have the Ful-Vue patents declared invalid. He had heard of the Barlow action and, indeed, had in August, 1939, obtained from Barlow a copy of the legal opinion received by him. On November 21, 1940, before any writ had been issued, Kimmel of Ful-Vue Sales Company called upon him. In return for \$1,500 in United States funds, Elliott agreed to sign a retail licence and not to go ahead with his action. His understanding, however, was that he, like Barlow, would be tacitly permitted to give special discounts and charge less than the minimum prices for lenses, if he so desired. Numont Ful-Vue again denied any special understanding.

By the end of 1939 licences from Numont Ful-Vue Corporation had been accepted by all wholesalers in Canada and also, with isolated exceptions such as Barlow and Superior Optical Company, by all retailers of any consequence. Prior to such licensing all Canadian and United States manufacturers of frames and mountings sold in Canada had received from American Optical Company manufacturing licences under one or more of the patents. The manufacturing licences had been implemented by issuance by American Optical of dozens of schedules fixing prices and terms to be observed by licensees. The Numont Ful-Vue wholesale and retail licensees pledged themselves to buy from and sell to the persons named by, and at prices and terms fixed by, schedules to be issued by the Numont Ful-Vue Corporation. The manner in which the schedules were made effective and the nature of the resulting controls will be described in the next chapter.

VI. THE STRUCTURE OF CONTROL UNDER THE NUMONT FUL-VUE PLAN

1. The Patents and Goods Involved

Over 60 per cent in 1939 and over 90 per cent in 1946 of all spectacles supplied to consumers in Canada through ordinary ophthalmic services consisted of goods covered by the Numont Ful-Vue licences. The licences purported to convey rights under eleven patents held by four separate American companies and under two trade marks, as well as indirect rights under eight additional trade marks. See Appendix I.

The goods involved included the following principal items:

Ful-Vue gold frames

Ful-Vue gold rimless mountings

Ful-Vue zylonite or plastic frames

Numont gold mountings (a semi-rimless mounting with top-bar attached at the nose and running back of the above, but not attached to, the lens to meet the temple or ear-attachment)

Arcway gold mountings (similar to the Numont but of slightly different design)

Rimway gold mountings (similar to the Numont but with top-bar attached to lens at outer or temple edge—not generally available until late 1940 or early 1941)

Toprim gold mountings (similar to the Numont but with the top-bar above the lens instead of behind the top edge—not an important item in the Canadian market)

Zyl-Arc mounting (similar to the Numont, but with zylonite rims on lenses)

Dia-Flex, Tri-Flex and Duflex spring straps (to give resiliency to lens attachments of rimless or semi-rimless mountings; may be used with either Ful-Vue or "regular" rimless mountings)

Camloc (a type of rivet for attaching lenses to rimless or semi-rimless mountings)

The proportions of each type sold in normal trade are estimated as follows:

	1939	1943	1946
"Regular" or non-Ful-Vue.....	40%	15%	8%
Ful-Vue metal frames }	35%	15%	7%
Ful-Vue rimless }			
Ful-Vue zylonite }	15%	35%	55%
Numont (including Arcway, Toprim, Zyl-Arc)	10%	25%	15%
Rimway	—	10%	15%

2. Manufacturing Licences

Reference has been made in sections 1 and 2 of chapter IV to the Numont and Ful-Vue manufacturing licences. United States and Canadian manufacturers licensed to manufacture the products referred to above are set out in Appendix II.

American Optical Company, the exclusive manufacturing licensee under the Numont and Ful-Vue patents, issued in great profusion schedules binding the listed sub-licensees to observe uniform minimum prices, terms, discounts and detailed sales plans. Separate series of printed schedules were issued for each

product and for each general market. All United States and Canadian manufacturers thus received explicit instructions respecting sales in Canada of the goods claimed to be covered by the patents.

Schedules were also issued for each item listing authorized Canadian wholesalers to whom manufacturers were permitted to sell. After the introduction of the Numont Ful-Vue plan direct purchases of licensed goods by Canadian retailers from United States manufacturers were rare and inconsequential. The laid-down cost in Canada in most if not all cases exceeded the price at which the same goods could be purchased from Canadian wholesalers.

Schedules setting forth other regulations to be observed by manufacturers were issued from time to time by American Optical. These regulations included rules respecting invoicing, packaging, labelling, advertising, trade names, markings to show gold content and a multitude of other similar provisions. One important provision applicable to all types of licence authorized a manufacturer with the approval of American Optical Company to give a special 10 per cent discount to any one Canadian wholesaler selected as his principal distributor.

Prices fixed for exports to Canada closely approximated United States domestic prices for Group "B" manufacturers, which, as will be recalled, were about 10 per cent less than the prices fixed by the larger Group "A" manufacturers. United States manufacturers of Arcway, for example, thus found that Canadian wholesalers could purchase Numonts as cheaply as Arcways, and more cheaply when purchasing from Consolidated Optical. A similar condition existed with respect to most of the other products covered by the Numont Ful-Vue licence.

Another anomalous feature of the export schedules under the manufacturing licences related to the cheaper types of Ful-Vue zylonite frames. As of May 1, 1939, the cheapest type of such frame sold to wholesalers in the United States for \$1. Prior to April 1 a slightly different type of frame had also been sold in the United States for 83 cents. American Optical instructed its manufacturing licensees that, effective April 1, this low-priced frame could not be sold in the United States. Sales were permitted to continue at 83 cents for the time being to Canada. The same frame could, however, be sold to wholesalers in countries other than Canada and the United States for 67 cents.

These licences, which were so essential to the success of the whole scheme, were effective throughout the period and were well observed.

3. Wholesale Licences

Between May 1, 1939 and December 31, 1946, Numont Ful-Vue Corporation sent to all licensed wholesalers 68 schedules to the licences and over 69 amendments to the schedules. This formal framework of control followed closely the pattern set by the manufacturing licence schedules. Schedules fixing minimum wholesale prices for frames and mountings covered all lines covered by the manufacturing schedules, set prices to retailers on identical columnar bases, prescribed identical rules for billing, delivery and exchanges, listed the same Canadian wholesalers between whom inter-wholesale sales could be made, and generally established the same sales plan.

The wholesale schedules were, however, much broader in range, covering minimum wholesale prices not only for frames but also for lenses sold for use in the patented frames or mountings, also minimum prices for sales of complete spectacles by wholesalers to consumers, and lists of licensed retailers to whom sales could be made. At any given moment after the plan became fully effective, wholesalers in making sales had to consider the terms not only of the licence itself but of a minimum of eighteen currently effective schedules consisting of over fifty printed pages together with a dozen or more pages listing licensed retailers. These schedules prescribed prices for well over ten thousand possible

combinations of frames and mountings and lenses (taking into account only basic lens classifications). These schedules, with interpretative rulings and supplementary regulations, were consciously designed to ensure no deviation by wholesalers from the minimum prices established.

The schedules establishing minimum wholesale prices for lenses sold with licensed products referred to the licensor's right to fix the quality of lenses used and required "that licensees shall not assemble with or mount by means of said licensed constructions or mountings lenses inferior in quality to those selling on prescription at the prices listed herein," going on to require that such prices be observed as minimum prices. There then followed definitions of two classes of single-vision lenses, "corrected" and "non-corrected", and six classes of bifocal lenses. The three last pages of the four-page lens schedule listed prices in detail.

4. Retail Licences

The extension of control to the retail level followed a form similar to that outlined above for manufacturers and wholesalers, but with much simplification for easy administration by the licensing company and for ready comprehension and observance by retailers. Between October 1, 1939 and the end of 1946 eleven relatively simple schedules were issued by Numont Ful-Vue Corporation under the retail licence. The retailer at any one time had to take note of and observe three schedules, one listing minimum prices for the patented frames and mountings, one listing minimum prices for lenses mounted in patented frames or mountings and a third listing licensed wholesalers and manufacturers from whom he was permitted to buy frames and mountings.

The main part of the schedule of retail prices of frames and mountings was as follows during most of the period:

Minimum Prices:

For Numont Ful-Vue Screwless Mountings with 10K bridge....	\$12.00
For Numont Ful-Vue Screwless Mountings Gold-Filled throughout	11.00
For Numont Ful-Vue Screw-Strap Mountings with 10K bridge....	11.00
For Numont Ful-Vue Screw-Strap Mounting Gold-Filled throughout	10.00
For Arcway Ful-Vue Mountings with 10K bridge.....	11.00
For Arcway Ful-Vue Mountings Gold-Filled throughout.....	10.00
For Rimway Ful-Vue Mountings with 10K bridge.....	11.00
For Rimway Ful-Vue Mountings Gold-Filled throughout.....	10.00
For Toprim Ful-Vue Mountings with 10K bridge.....	10.00
For Toprim Ful-Vue Mountings Gold-Filled throughout.....	9.00
For Ful-Vue Metal Frames.....	7.50
For Ful-Vue Rimless Mountings.....	7.00
For Ful-Vue Zyl-Arc Frames.....	10.00
For Ful-Vue combination Zylonite and Metal Frames.....	8.00
For Ful-Vue all Zylonite Frames.....	5.00
For Centre Position Spring Strap Mountings.....	6.50

Permission is hereby granted to all Numont Ful-Vue Dispenser Licensees to grant a discount not to exceed 20 per cent from these prices, to the following classes of persons:

- Members of the Clergy
- Habited members of Recognized Religious Orders
- Practising Physicians
- Employees actively employed on full time in the establishment of the licensee, or the establishment of which the licensee's business forms a part."

The schedule of lens prices reminded the retailer that the licensor had reserved the right "to proclaim the quality of lenses to be assembled with frames or mountings", went on to state that lenses must "not be below first quality", and then defined classes of lenses and set minimum retail prices for each class. The only discounts permitted were those specified above with reference to frames and mountings. In October, 1940, and February, 1941,

slight changes were made, introducing new classes of lens. After the latter change the minimum retail prices per pair were as follows:

	Spheres	Cylinders	Spheres or Cylinders
"Non-Corrected" Single Vision Lens.....	\$5.00	\$6.00	
"Corrected" Single Vision Lens.....	6.00	7.00	
Fused Bifocals			\$ 9.00
Fused Bifocals, Kryptok Grade.....			11.00
Ultex H or M and similar Bifocals.....			10.00
Ultex B and similar Bifocals.....			12.00
"Colour Free" Fused Bifocals.....			12.00
Bifocals with specially fused segments.....			14.00

These prices were for white lenses. Tinted or coloured ophthalmic lenses of these types were given minimum prices of \$2.00 more per pair for single vision lenses and of \$3.00 more for bifocals.

In examining the following table, which indicates wholesale and retail margins on goods falling within the scope of the Numont Ful-Vue licences, certain qualifications should be kept in mind.

Wholesale to retail stock prices for all items are last column (largest quantity) prices less greatest volume discount. The \$3.20 stock price for Numont mountings, for example, is the 25 pair price less 10 per cent. Comparatively few retailers qualified for the 10 per cent discount, and many purchased in quantities of less than 25 pairs, so that most stock sales would be made at prices somewhere between the stock price quoted and the prescription price.

Prices of lenses sold in stock quantities were not subject to control under Numont Ful-Vue licences and are inserted merely to provide a basis for comparison.

The bifocal lens used in the illustration is one of the most expensive lenses listed in the retailers' schedules. Stock sales of this lens to retailers would be made only in a few cases, and in these the lens would be sold in a form not more advanced than semi-finished. No stock price is therefore applicable.

Single vision lenses, when sold in stock quantities, are usually in uncut form, and prices quoted are from uncut lists. These lenses must be edged, and bevelled or drilled according to requirements. On prescription lenses, the processing is complete. In each case, factory and wholesale lens prices are for spheres in the lowest foci.

Factory lens prices are arrived at, following the generally accepted formula for the period, by deducting one-third from second column wholesale lists for stock.

It is estimated that at least 75 per cent of frames and mountings sold in 1941 were of the Ful-Vue zylonite, Ful-Vue gold-filled, Numont and Rimway classifications, types of which are used in these illustrations.

TABLE 3—EXAMPLES OF PRICES OF GOODS AFFECTED BY NUMONT FUL-VUE PLAN
FEBRUARY, 1941

FRAMES AND MOUNTINGS

	Ful-Vue (low priced) Zylonite frame		Ful-Vue white gold-filled frame		Numont and Rimway pink gold-filled mounting	
	Stock	Prescription	Stock	Prescription	Stock	Prescription
Factory to wholesale.....	\$1.14		\$2.10		\$2.72	
Wholesale to retail.....	1.26	\$2.05	2.34	\$3.50	3.20	\$4.30
Minimum retail price to consumer.....		5.00		7.50		10.00

LENSES
(for lowest powers, per pair)

	"Non-corrected" single vision white		"Corrected" single vision white		Ultex B bifocal coloured
	Stock	Prescription	Stock	Prescription	Prescription
Factory to wholesale.....	\$0.50		\$0.67		
Wholesale to retail.....	0.51	\$1.65	0.68	\$1.90	\$7.00
Minimum retail price to consumer.....		5.00		6.00	15.00

FRAMES AND MOUNTINGS WITH LENSES¹

	Ful-Vue Zylonite frame with white "non-corrected" single vision		Ful-Vue white gold-filled frame with white "corrected" single vision		Numont and Rimway as above with coloured Ultex B bifocals
	Stock	Prescription	Stock	Prescription	Prescription
Factory to wholesale.....	(\$1.64)		(\$2.77)		
Wholesale to retail.....	(\$1.77)	\$3.70	(\$3.02)	\$5.40	\$11.30
Minimum retail price to consumer.....		10.00		13.50	25.00

¹ Frames and mountings fitted with lenses are sold on prescription only. The figures in brackets do not represent goods actually sold in combination but are included merely for convenience.

5. Extension of the Plan to Additional Types of Frame and Mounting

The original plan covered Ful-Vue frames and mountings, the Numont-style mountings then on the market, and three minor types of spring-strap attachment used in both Ful-Vue and non-Ful-Vue mountings. Two additional types of Numont style mounting were later added—the Zyl-Arc mounting in September, 1939, and the Rimway mounting in February, 1941.

Camloc mountings were brought under the plan in November, 1939. Patented by the Martin-Copeland Company, Providence, R.I., Camloc was a type of rivet used in attaching rimless mountings to lenses. In order to bring Camloc mountings within the plan, Numont Ful-Vue Corporation required Imperial Optical and its associated companies, the only Canadian Camloc distributors, to sign amendments to their wholesale licences and to obtain amendments to the retail licences of customers to whom they sold Camloc. Writing to A. K. Marsters at Southbridge on August 23, 1939, Curry stated:

"... anything less stringent than this type of set up will be ineffective in Canada. The general reputation of our entire program as to rigidity and control is at present hanging in balance and it is going to require a lot of good hard driving to create for it a wholesome respect in the minds of our licensees. For this reason I would rather see Camloc as such held to a good tight program."

Although Numont Ful-Vue Corporation issued licence amendments and schedules for Camloc effective November 8, 1939, it had at that time no apparent right to do so. Not until March 27, 1940, did it receive through American Optical Company licensing rights under the Canadian Camloc patent and trade mark.

No other formal additions were made to the plan. The Numont Ful-Vue schedules, however, provided for varying wholesale prices for Numont and Ful-Vue type spectacles equipped with the various other types of straps,

rivets and other special devices for attaching lenses to mountings. Since most spectacles sold were covered by the licences, the plan thus indirectly controlled the prices of most mountings incorporating such devices.

Perhaps the most important of these was the Loxit attachment, patented and developed by Bausch & Lomb. See section 3 of Chapter IV. Bausch & Lomb sub-licensed other manufacturers including American Optical to use this type of so-called "molded rivet" under their own trade names. Numont Ful-Vue wholesale schedules required additions of 10 cents for Numont and 40 cents for Ful-Vue when Loxit straps were used. These supplementary schedules were sent only to licensees who also held Loxit licences from Bausch & Lomb.

Plans were apparently made early in 1939 between Bausch & Lomb (U.S.) and American Optical respecting sales by the latter of its own type of Loxit in Canada. Writing his Canadian manager on February 10, 1939, the late Platt Moody of Bausch & Lomb stated:

"...if you have any suggestions or ideas which we can incorporate in the set-up (which we will prepare for the American) include them in your letter. Understand that we are not to be placed in the position of giving anything to the American, but as I told you before, they must conform with the policies which we have successfully followed in the Dominion..."

On at least five occasions between February and July, 1939, Amsden, Canadian manager, told his head office or some of his principal customers that Reid of Consolidated Optical had assured him that "... he would be governed by any policy that we set up respecting Loxit."

6. Application of the Plan to Spectacle Parts not Directly Covered by Patents

To ensure full control of complete spectacles the plan necessarily extended to all parts of Ful-Vue, Numont and other patented spectacles, including parts that might be used with unpatented spectacles. Reference has already been made and will be made again to the application of the plan to lenses. Spectacle parts also in this category included temples or ear attachment pieces used with all types of spectacles, and the "centres" or bridge portions of rimless spectacles.

Under the plan both manufacturers and wholesalers were required to sell temples with all fronts sold for rimmed or semi-rimless spectacles or with end-pieces sold for rimless mountings. In other words, neither fronts nor end-pieces could be sold without temples. The restriction, as it affected sales by wholesalers, was relaxed slightly in January, 1940, following pressure from the trade, so as to permit limited sales of fronts and end-pieces separately for repair purposes only.

Two examples of how the manufacturing restriction operated are illuminating. Early in 1943 National Optical, embarrassed by a surplus of Numont temples, applied to Rickwood, the Canadian manager of Numont Ful-Vue, for permission to buy only fronts from a manufacturer. Rickwood wrote Marsters of Southbridge recommending that the request be granted "in view of the metal shortage". Marsters, however, declined the request, explaining:

"If we did not have this ruling, non-Ful-Vue temples and temples of much lower quality would undoubtedly be used to the detriment of the Ful-Vue product."

Later in 1943, Central Optical, faced by a similar problem, ordered fronts from an American manufacturer. The manufacturer replied that his licence prevented meeting of this request. He suggested, however, that if Central would forward its surplus temples, the manufacturer would allow a credit of 35 cents per pair, would assemble them with his own fronts and sell back the complete frames to Central Optical. Central could thus obtain fronts but only by exporting and re-importing its own temples with the additional costs involved.

Numont Ful-Vue issued no wholesale price schedules for unpatented rimless centres used with Ful-Vue temples and ends. It required, however, that a wholesaler sell such centres at not less than his regularly published price. Any departure from this rule was considered a breach of the wholesale licence which provided that:

"No bonuses or considerations of money, lower prices on other articles or terms and credits or other indirect advantages are to be given by the Distributor Licensee to evade the purpose and intent of this licence."

7. Application of the Plan to Repairs

The problem early arose as to how far the licensing plan affected repairs to the patented mountings, and also replacement of lenses. Could a wholesaler replace lenses for an unlicensed retailer? Could an unlicensed retailer repair patented mountings and frames? Could a licensed retailer, in selling replacement lenses in a patented mounting, disregard the minimum prices set? The wholesale licence itself, although sweeping in terms, did not specifically limit sales of replacement lenses to licensees. The schedules to the licence were similarly ambiguous. They prescribed the quality of lens to be used but in terms fixed minimum prices only of lenses sold with complete mountings. On the other hand, the schedule titles were broadly worded, establishing "minimum prices for lenses forming part of a licensed mounting or construction". The retail licence and schedules were equally ambiguous.

The failure to cover repairs specifically may have been unintentional in the first instance. Certainly some early attempts were made to apply the plan to all repairs. After January, 1940, however, Numont Ful-Vue consistently advised those who inquired or complained that the licences did not extend to repairs. Replying to an optometrist in northwestern Ontario, Curry of Numont Ful-Vue on January 26, 1940, stated:

". . . schedules issued do not specifically cover the retail price for repair lenses . . . it is regrettable that any licensee should indulge in cut prices on repairs as it seems to us that in doing so he has not followed sound business practices."

Writing the same optometrist on February 21, Amsden of Bausch & Lomb stated:

". . . I have no doubt that the original intention of the Numont company was to enforce the schedule on repairs as well as on the original new glasses, but, confidentially there has recently been an effort in both Montreal and Toronto by two of the largest dispensers [Barlow and Superior Optical], to upset the entire Ful-Vue policy."

On a number of occasions later in 1940 and early in 1941 Numont Ful-Vue, when questioned by wholesalers, admitted that the licences did not bar repair work for non-licensees. On February 26, 1940, Curry wrote Marsters of Southbridge recommending strongly that a special bulletin be issued clarifying this matter and pointing out that "we would be in a much cleaner position". Marsters replied:

"In view of the fact that we quote prices only for the complete mounting... there is no obligation on our part to point out negatively that lens repair prices are not subject to the terms of the licence..."

Similarly in October, 1940, Marsters refused to approve Curry's suggestion that a bulletin be sent to all wholesalers respecting repairs for non-licensees:

"Consequently, as the licence already permits this, as it stands today, we see no reason for sending a bulletin to all licensees to that effect."

8. Application of the Plan to Lenses

Reference has been made to the controls imposed by the plan on minimum prices and quality of lenses mounted or inserted by wholesalers or retailers in patented frames and mountings.

The wholesale licence required wholesalers to refrain from any indirect violations of the plan. This was interpreted as meaning that the controls on lenses applied not only to lenses actually sold with complete spectacles embodying the patented features but also to prescription lenses which the wholesaler knew, from the shape or type of drilling ordered, would be used by the retailer to make up such spectacles. This interpretation, as well as the primary emphasis on price, is shown in the following letter of August 9, 1940, written by Curry to Commercial Optical:

"If you have good reason to believe that these lenses are to be used in mounting up Numont Fulvue mountings, then they must be first quality; and any sale of Celex quality as evidenced by Celex prices is a violation of your licence." (Italics not in original).

These lens controls were extended even further. A retailer or wholesaler could take rimless end-pieces and temples purchased from a manufacturer as "regular" or non-Ful-Vue, and mount them with lenses that had been drilled "high" so that the temples were above the centre line of vision, thus allegedly infringing the Ful-Vue patents. After much debate and correspondence with licensees, Numont Ful-Vue, on the advice of American Optical's solicitors, issued a bulletin on September 26, 1939, to all wholesaler licensees prescribing that no non-Ful-Vue temples should be used where the drilling was more than 2 mm. above the centre position. This ruling was designed to ensure that only temples and end-pieces purchased as Ful-Vue could be mounted above that position, and that only lenses of the quality and price prescribed could be drilled above that position.

Several independent wholesalers protested strenuously against this interpretation of the plan, but to no avail. American Optical's attitude was disclosed in a letter of June 15, 1939, by Wilson of Southbridge to Curry:

"Dave Cadesky's remark that they had drilled lenses twenty-five years ago above centre doesn't mean a thing if today someone has a patent on that feature, but more important in Canada, Jerry, is the fact that the jobbers have signed a contract in which they admit that they will not contest the validity of the patent, nor the actual wording of the claims as they exist."

9. General Administration of Numont Ful-Vue Corporation in Canada

A comprehensive price control and regulatory plan such as the licensing system set up by American Optical Company on the basis of Ful-Vue and Numont patents obviously required more than the adoption of the licences. Schedules and rulings had to be formulated and constant vigilance and supervision were required to ensure that all who should have been licensed were licensed and that they all observed the terms of their undertakings. With respect to the manufacturing licences this was a function which was under the direct control of American Optical at Southbridge. The wholesale and retail licences however required a much closer supervision and this was secured by the establishment in Canada of a branch of the Numont Ful-Vue Corporation. An office was opened in Toronto in 1939 and a Canadian manager appointed who was responsible to the Southbridge officials and under their direct control.

The duties of the Canadian manager included the following:

- (1) Preparing drafts of schedules to the licences and issuing them when approved;
- (2) Correspondence respecting rulings and interpretations;
- (3) Maintenance of detailed records, including cards recording all pertinent data respecting each wholesale and retail licensee;
- (4) Dealing with applications for licences;
- (5) Recording and inquiring into complaints of violation of the price schedules;
- (6) Arranging, where necessary, for audits, test purchases, or other action to detect violations;
- (7) Keeping detailed records of visits by him to licensees and others across Canada. Printed forms were prepared which when completed described in detail the location, equipment, qualifications, and attitude of each licensee. On such trips complaints were recorded and investigated; "qualifications" of licensees were checked, and applicants for licences interviewed.

VII. ESTABLISHMENT AND ENFORCEMENT OF MINIMUM PRICES UNDER THE NUMONT FUL-VUE PLAN

I. Establishment of Minimum Prices

The minimum prices and supplementary details of control under the manufacturing, wholesale and retail licences which made up the Numont Ful-Vue plan were determined by officials of the American Optical Company at Southbridge, Mass. The Canadian manager of Numont Ful-Vue Corporation, the agency administering the wholesale and retail licences in Canada, was, of course, entirely under the direct control of these officials in respect of the establishment of the Canadian minimum prices.

We have no evidence that American Optical Company, once the plan became operative, consulted or agreed with other United States manufacturers respecting the details of the manufacturing controls for Canada, except that there was very limited consultation, already referred to, with Bausch & Lomb Optical Company, Rochester, N.Y., with reference to Loxit mountings of the Numont and Ful-Vue type. With reference to wholesale prices for frames and mountings American Optical apparently acted independently, using as a base Consolidated Optical's wholesale prices which were similarly established on direction of officials of American Optical. In establishing wholesale lens prices and all minimum retail prices, American Optical naturally had to take into account previously existing prices in the Canadian market and looked to Consolidated Optical for advice.

As we have seen, meetings of Canadian wholesalers, especially the Montreal meeting of March 10 and 11, 1939, were held around the time the plan was introduced. At these meetings wholesalers discussed the minimum wholesale prices proposed, especially the lens prices, agreed to the plan, and accepted licences. After the outbreak of war in 1939 additional meetings were held at which Canadian wholesale prices were discussed. It will be recalled that the manufacturers' prices fixed under the Numont Ful-Vue licences for sales to Canada resulted in the laid-down costs of patented frames and mountings imported from the United States being somewhat higher, by reason of duty and other charges, than the prices at which Consolidated sold the patented lines in Canada. With the added burden of foreign exchange in the fall of 1939 the costs of imported lines were raised still further above Consolidated's prices. As American manufacturers could not alter the prices fixed in their licences, independent wholesalers sought at these meetings to get adjustments in the selling prices of Consolidated so as to bring them into closer relationship with the laid-down costs for imported United States goods, particularly with respect to the prices for quantity sales. Meetings of Ontario wholesalers were held at Toronto on October 14, 1939, and of Quebec wholesalers at Montreal on October 25, which were attended by C. O. Cozzens, then vice-president of American Optical, by other officials of American Optical, by officials of Consolidated Optical and by the Canadian manager of Numont Ful-Vue Corporation. The adjustments in prices made subsequently were not regarded as sufficient by wholesalers as indicated in a letter of October 26 written by S. B. Coen, president of Commercial Optical, Montreal, to Universal Optical Company of Providence, R.I.:

"At the Ful-Vue meeting here yesterday in which nearly all the jobbers in Canada were represented. . . . they increased the price in the fifth column on Ful-Vue frames of about 15 cents and 10 cents on the first, second, third and fourth columns. This helps some, but not enough."

Numont Ful-Vue Corporation issued new price schedules effective November 6, 1939, modifying prices on some items.

American Optical and Numont Ful-Vue Corporation apparently did not again discuss with Canadian wholesalers prospective changes in the licence schedules.

Discussions about this time also related to the refusal of American Optical to permit in Canada the differentials referred to in chapters IV and VI, existing in the United States between what could be charged by A and B manufacturers for Ful-Vue frames and mountings and for Numont-type mountings. Writing to Coen of Commercial Optical on October 31, 1939, Sweeney of Universal Optical said:

"I was up to Southbridge yesterday and fired the first gun with reference to getting a differential in price for the Group B manufacturers, similar to that which exists in the States. . . . There is no differential on anything going into Canada. The prices of all manufacturers are the same."

Writing a year later, on October 18, 1940, Sweeney referred to discussions he had had with American Optical officials and stated:

" . . . I am quite confident that something in the nature of differentials similar to those existing in the States will be worked out so that not only can we export into Canada but you can operate at a profit on imported lines from us."

Despite efforts to secure the differential no change was made in the Canadian plan.

Retailers generally were not consulted and from the nature and organization of the trade could not be consulted generally with respect to the establishment of minimum retail prices which they were required to observe under the terms of their licences. R. F. Reid, manager of Consolidated Optical, wrote Numont Ful-Vue Corporation on April 21, 1939, setting forth the minimum retail prices which he recommended should be fixed. With two exceptions his recommendations were adopted. He recommended a minimum price of \$8 for Ful-Vue metal frames; a price of \$7.50 was established. He recommended a basic price of \$4 for non-corrected lenses; a price of \$5.00 was set. Some light is shed on the latter change by correspondence in June, 1939, between J. W. Curry and G. V. Mackie, manager of Imperial Optical at Winnipeg. Mackie stated:

"I have learned from Mr. Amsden [Bausch & Lomb] that the minimum price for single vision lenses . . . is going to be set at \$4. I have discussed this price with our trade here and the majority feel that \$4 is too low, and would prefer to see this price set at \$5."

Curry replied pointing out that no price had yet been definitely established and emphasizing that the prices would be only minimum prices. He also said:

"You recognize, of course, the Eastern condition and the fact that minimum level cannot be established too high without having a severe reaction in that area."

2. Maintenance of Prices by Manufacturers

The Numont and Ful-Vue manufacturing licences under the Canadian patents issued by American Optical to United States manufacturers were substantially well observed. The manufacturing licensees generally observed the conditions of their licences. Many of them favoured the reduction of price competition effected by the scheme and co-operated without reluctance. All were conscious of the sanctions which could be applied by American Optical in the event of non-compliance. The manufacturing licence program was, of course, basic to the success of the wholesale and retail licensing plan in Canada. An example of the care exercised by most manufacturers in observing the conditions of their licences is indicated by the reaction of Shuron Optical Company, of

Geneva, N.Y., to efforts of its Canadian agent, Kahn Optical, to secure certain minor modifications in selling arrangements. Shuron wrote to Kahn on August 5, 1940:

"We are forced to maintain the Canadian schedule issued by the American Optical Company . . . any change in schedule by us would immediately be construed as a deliberate cut in price—subjecting us to severe penalties. . . ."

Reference has already been made, in chapters IV and VI, to the details of the manufacturing controls.

3. Enforcement of Wholesale Licences

The primary object of the wholesale licences and the schedules issued under them was to ensure that Canadian wholesalers made no sales of the wide range of goods affected by the licences at prices below the minimum price levels established. To make this purpose fully effective positive steps were taken by the Numont Ful-Vue Corporation in Canada, under the direction of American Optical officials, to enforce the plan. Enforcement was especially active during the first four years and the Numont Ful-Vue manager closely followed up all information suggesting violation of the licence schedules by any wholesale licensee.

(1) ORIGINAL PLAN FOR INVESTIGATION AND ENFORCEMENT.—Immediately after introduction of the retail licences, Numont Ful-Vue prepared to give effect to the clause in the wholesale licences permitting it to audit wholesalers' books and records. Thus on September 11, 1939, Marsters wrote to Curry:

" . . . Mr. Lehrich and Mr. Stewart are arriving in Canada some time this week to launch the auditing work through the Canadian chartered accountant whom Mr. Lehrich has arranged to do this work."

On the following day, W. A. Stewart of Southbridge wrote to Curry, referring to a meeting to be held at Montreal on September 19, by Curry, Marsters, Lehrich and the Canadian chartered accountant:

" . . . Also Mr. Lehrich, Mr. Marsters and Mr. Richter should have a chance to meet with the Montreal Wholesalers and I would suggest that possibly you might do this at lunch. It will probably be necessary to introduce Mr. Lehrich as the supervisor of the Numont Ful-Vue accounting or enforcement work Following the completion of the work in Montreal the four of you then should go to Toronto and Mr. Richter and Mr. Lehrich can be introduced to the wholesalers in Toronto. We should capitalize on Mr. Lehrich's atmosphere or his known reputation as an enforcement type of attorney."

The original plan to have regular audits of wholesalers' records and generally the "enforcement of the program on its original basis" was held up because, as the correspondence indicates, of preliminary inquiries which were being made in the fall of 1939 by the Combines Investigation Commission. On January 22, 1940, W. A. Stewart of American Optical wrote to R. F. Reid of Consolidated Optical:

"When the day comes, then we can throw out ten or twelve retailers down there [Montreal], for violations and send an accountant in to go after the wholesalers, you'll get a different atmosphere We do hope the day will come when we put some of the atmosphere of the Toronto police force in there and go out impartially but steadily and determinedly to catch the offenders."

In February, 1940, after being advised by his Canadian solicitor "that we now proceed with the enforcing of our licences", Curry recommended that audits be made, beginning with Commercial Optical. In March, most if not all wholesale licensees were told to expect visits from the auditors. In fact, however, this policy was abandoned later in 1940 and audits were made only as required to meet specific situations of apparently serious disregard of the licences. Comprehensive audits were made of Commercial Optical and Monarch Optical in 1940, and of Central Optical in 1941.

The original plan also contemplated use of "test purchases" to secure evidence of violations by wholesalers. A test purchase required the co-operation of a retailer, who would send an order to the suspected wholesaler. Consolidated Optical planned to assist Numont Ful-Vue in making arrangements for such purchases. On October 9, 1939, Marsters wrote Reid of Consolidated:

"... more must be done than simply having an auditor go in and inspect a licensee's books. The best and most practical means of discovering a violator who is suspected of price-cutting, etc., is to have purchases made from the suspected violator by a friendly retail customer or a shopper . . . it would seem that Jerry [Curry] could use the assistance of Walter Coffin [Consol's Montreal manager] with respect to Sammy Coen [Commercial Optical] and we would appreciate very much your arranging it so that Coen can be properly shopped."

On the following day Marsters wrote Curry:

"...However, with respect to a distributor, the job is much simpler. Just be sure that the retailer making the purchase keeps either a carbon copy or a photostat of his original order, and copies of the shipping tickets, the actual invoice, and the merchandise. He should identify the merchandise with a sticker of some sort and place upon it the date purchased, from whom and his signature. It would then be nice to get a statement which need not be sworn to, in his own handwriting, that he had gone through this transaction."

Reid replied to Marsters on October 19:

"...we will be glad in every way to give our support, particularly in trying to get information, which probably can be done better by our Organization than by the Numont Corporation itself going direct."

The instructions given by Marsters to Curry respecting the technique of making test purchases from wholesalers were also passed on to Reid of Consolidated, since we find him on October 12 giving them in detail to Coffin, his Montreal manager. In the same letter he instructed Coffin to try to put the technique in operation in a case in which Coffin had complained about a Montreal department store buying Ful-Vue temples and end-pieces from an unknown wholesaler at 90c instead of \$1.30. Reid said:

"Walter, you just have to find some way to have an order put in through . . . [the department store], get the temples and ends and send them on to us. I think it would be perfectly legitimate to pay someone \$5.00 as a premium to get that. If you could get one of the lads we know in the stock department and tell him that you want some of those temples and ends, that you have an inquiry for them and order 50 pair, . . . have . . . [the department store] . . . send you the goods and the invoice or loan you the invoice and you could take a photograph of it. . . . If you could get it for one day you could have it photographed, and the order too, for that matter, send us the original goods that were received on that order at 90c a pair instead of \$1.30, if they are marked EFR4793 or any other number designating Ful-Vue, those would be the required details to get. . . . Don't let it be known to your staff generally but handle it casually yourself."

There is no evidence, however, that Coffin attempted to make the test purchase as instructed.

(2) ENFORCEMENT PRIMARILY ON COMPLAINT. Broadly speaking, however, wholesale enforcement was based on complaints received by Numont Ful-Vue from wholesalers to the effect that other wholesalers were, directly or indirectly, selling at prices below the minimum prices fixed. On receipt of a complaint, the Numont Ful-Vue manager would write the alleged offender calling for an explanation. If the explanation given was not adequate, he would write a letter of warning. If repeated complaints were received about a wholesaler, he would visit him, perhaps check his books, and warn him to exercise greater care. If this failed to bring results a formal audit might be made. Extreme steps were, however, rarely necessary, especially after the successful injunction proceedings described below, against Commercial Optical in 1940.

All wholesalers of consequence assisted in the task of reporting violations. The records of Numont Ful-Vue Corporation show numerous complaints from

Consolidated Optical and Imperial Optical. Bausch & Lomb and Kahn Optical were considerably less active in reporting violations. Other wholesalers making complaints were, in order of frequency, Commercial Optical, Maritime, Monarch, Central, Canadian Optical Service, Butler, Sterling and Hudson.

Most complaints alleged direct disregard of the minimum price provisions by means of special prices or discounts given to particular retailers in particular transactions. Such complaints related not only to sales in stock quantities of patented frames and mountings but also to prescription sales to retailers of complete spectacles and to prescription sales of lenses alone drilled or shaped for use with Numont or Ful-Vue mountings.

(3) INDIRECT PRICE VIOLATIONS. The licences prohibited not only direct sales at prices below the minimum prices fixed but also all indirect attempts to accomplish the same result by giving secret or indirect discounts or bonuses or premiums. To ensure full maintenance of the price structure Numont Ful-Vue Corporation and Consolidated Optical, its most important assistant in enforcement, were naturally concerned about this indirect type of price reduction.

Writing his Montreal manager on October 17, 1939, Reid of Consolidated Optical stated:

"We are quite concerned about National offering these people electric clocks or radios, as you say. Believe me, that's going to be followed up."

In July, 1939, Reid was concerned about Imperial Optical giving certain Saskatoon oculists free spectacle cases (which, of course, were not directly affected by the plan):

"They cannot do that with either Ful-Vue or Numont because it would be giving a bonus and that would be equivalent to cutting a price..."

In February, 1940, the Saint John branch of Imperial Optical complained about Central Optical giving free velvet counter pads to favoured customers. Numont Ful-Vue warned Central, pointing out that this practice constituted a violation of the licence.

In August, 1941, Consolidated Optical complained about Bausch & Lomb violating the licence by giving customers free advertising display signs.

(4) ATTEMPTS BY WHOLESALERS TO REDUCE PRICES ON OBSOLETE GOODS. On several occasions Canadian wholesalers found themselves stocked with licensed goods which had gone out of style or which for other reasons could not be successfully sold at the minimum prices fixed. Numont Ful-Vue ruled that no reduction could be made and that these goods would either have to be held for eventual sale at the minimum prices or melted down as scrap.

Curry of Numont Ful-Vue, writing to Southbridge in 1939, stated with reference to a request by Kahn Optical for permission to reduce prices on a quantity of "obsolete" goods:

"I told Mr. Kahn that in my estimation that if we ever provided a special schedule for any Jobber to clear out obsolete merchandise that we would break our plan down because a certain class of retailer would buy nothing but 'Obsolete' merchandise at special prices with the result that other Jobbers who were looking for orders from these large retailers would be claiming obsolescence (*sic*) on some line whenever they went to write an order."

Again, in February, 1941, Consolidated Optical found itself with 150 Toprim mountings which could not be readily sold at the minimum prices and was told by Numont Ful-Vue that if it did not wish to keep these mountings in stock it could melt them down. In November, 1942, Bausch & Lomb found itself with a stock of white gold-filled Ful-Vue products which Amsden reported "unfortunately cannot be moved too readily as our Numont Ful-Vue contract does not permit us to sell these below prices listed..." He added: "However, we feel by the end of 1943 that the largest percentage of this Canadian stock held in Rochester will be liquidated."

In April, 1945, Consolidated Optical became much concerned about sales by Bausch & Lomb of approximately 300 Rimway mountings made by the Bishop Company, an American manufacturer. To get rid of them Bausch & Lomb sold them at \$2.50 compared with the list price of \$3.35. Writing his assistant, Ingram, on April 11, Amsden stated:

".....Lett [of Consolidated Optical] is very much concerned about our selling Bishop 4-point mountings....I explained to Ralph [Lett] that....we had no other alternative but to dispose of them on the open market to which Lett replied that they had had to scrap plenty of obsolescence rather than dump mountings on the market and effect (sic) the whole Numont set-up. I assured him that we had but a limited stock.... and...there would be no repetition of the offence if it was an offence."

(5) FORMAL ENFORCEMENT PROCEEDINGS. In most cases where justified complaints were received by Numont Ful-Vue Corporation respecting violations by wholesalers, substantial compliance was ensured by the giving of a warning. In several cases, however, described below, some of the formal sanctions provided by the licence had to be brought to bear on wholesalers disregarding the minimum price provisions, both to bring them into line and to serve as a warning to others.

(a) *Injunction Against Commercial Optical Company Limited, Montreal.* After the delay in beginning audit of wholesale licences, Curry, the Numont Ful-Vue manager, wrote Marsters of Southbridge on February 26, 1940, recommending

"That arrangements be made that Mr. Lehigh start Richter and Usher, Montreal accountants, as quickly as possible on the auditing work beginning with Commercial Optical Company in Montreal."

Montreal wholesalers, especially Consolidated Optical, had made many complaints about Commercial Optical in the fall of 1939. Coffin, manager of Consolidated, Montreal, complained to Reid on January 10, 1940:

"There certainly will have to be something done regarding the situation here with the wholesalers. First of all we had to contend with the Commercial Optical who are cutting on prices. Now we have the Central Optical. Jobin claims that he is supplying first quality lenses in Ful-Vue frames as per the agreement signed, but he sells them for 70c and he claims that it is his own business if he wants to sell them as low as 40c a pair." [Lowest lens prescription under the licence was \$1.65].

The audit of Commercial's books disclosed some forty infractions, many of them of a petty nature, which, under the terms of its wholesale licence, made it liable to a \$40,000 penalty. Court action was instituted at Montreal by Numont Ful-Vue Corporation for the penalty and for an injunction restraining Commercial from further violation of the licence contract. The petition filed by Numont Ful-Vue on June 7, 1940, stated inter alia that:

"Upwards of One Million Dollars (\$1,000,000) has been expended in advertising and sales promotion of products coming under Ful-Vue and Numont patents in building up a valuable goodwill for the products referred to in this licence agreement. . . ."

Commercial did not contest the proceedings and on July 18, 1940, an injunction was granted and Commercial, after negotiations, paid \$1,000 as penalty. Commercial claimed vigorously that other wholesalers had been equally guilty and that it was unfairly picked out as an example to others.

Subsequently on August 26, Coen of Commercial gave Numont Ful-Vue notice of cancellation of his wholesale licence for Montreal effective November 26. On October 24, Numont Ful-Vue gave him notice of cancellation of the licences of all his branches. The licences were, however, extended by mutual agreement and on February 1, 1941, the notices of cancellation were formally rescinded.

Coen claimed in September 1940 that he had sufficient goods to last him eight or ten months, that he was not afraid of patent infringement action because he felt the principal patents were invalid, and that the Numont Ful-Vue

plan would break down in Montreal without his support. It will be recalled that the Barlow patent impeachment action began in October, 1940. Coen was visited several times by officials of American Optical. Negotiations for settlement were conducted mainly, however, by Sweeney of Universal Optical, Coen's principal supplier, with officials of American Optical. The agreement of February 1, 1941, signed by Coen and Numont Ful-Vue, provided that no further action would be taken under the injunction without the approval of Universal Optical and that no other action would be taken without notice and allowance of a period of thirty days to correct violations. Sweeney advised Coen to sign. On January 6, 1941, he wrote:

"It is the opinion of our attorney....that you will be free from any annoyances and will not be molested in the future."

Coen replied on January 25 declining to sign unless he was repaid all expenses in the injunction action, totalling \$2,330. Coen in his oral evidence stated that he received in cash \$1,000 plus legal expenses from an official of Universal Optical who, he understood, received it from American Optical.

Coen claimed that after the injunction action he generally observed the licence, not because he feared Numont Ful-Vue but rather because he obtained such a small margin of profit on goods purchased from Universal Optical.

In November, 1941, however, Rickwood of Numont Ful-Vue asked Marsters for permission to audit L'Optique Lavolette of Three Rivers. He stated he wanted to check Commercial again but could not do so until he had checked the Three Rivers firm because of Coen's complaints against it. On December 15, 1941, Amsden of Bausch & Lomb reported to Hudson, Vancouver, that Rickwood was in Montreal trying to get evidence against Commercial, and he commented:

"... Rickwood stated that it looked as though they would have to again take our friends, Commercial, to court and cancel their Numont contract. Whether this will be done in view of the litigation now in process in the United States is questionable in my opinion."¹

We have no record, however, of any further formal action against Commercial.

(b) *Audit of Central Optical Company Limited, Montreal.* An audit of Central Optical's books was also started in 1940 by Numont Ful-Vue. This audit was not carried out without strong opposition on the part of Central's president, the late Arthur Jobin, who claimed the auditors took too long and examined records not relevant to Numont and Ful-Vue sales. Jobin finally refused further access to his books. Numont Ful-Vue in June, 1941, launched injunction proceedings against Central to require it under its licence to permit audit. This action was settled out of court on July 3, 1941, and Central agreed to permit the audit to continue. The audit must have shown that Central was substantially observing the fixed minimum resale prices; on September 25, 1941, Marsters wrote to Rickwood:

"I am glad to note that Jobin ... must be complying with the provisions of his licence ... I certainly would like to see him and discuss the results of the recent audit."

(c) *Audit of Monarch Optical Manufacturers Limited, Toronto.* This firm, which had caused trouble for Numont Ful-Vue in the first year of the plan, and was suspected of having supplied Superior Optical with goods before the latter

¹In 1940 four civil and four criminal actions were begun under the Sherman Act by the United States Department of Justice against various groups of optical goods companies. The government alleged illegal price fixing and other undue restraints of trade respecting unpatented frames and mountings and various types of lenses, including elimination of competition in second quality "non-corrected" lenses. One civil action involved Numont Ful-Vue Corporation and the United States counterpart of the Numont Ful-Vue plan. Some actions were disposed of by fine or injunction later in 1940 and 1941. The Numont Ful-Vue action was still pending at the end of 1947. The Numont Ful-Vue plan in the United States apparently differed in detail but not in essential purpose from the Canadian plan. The wholesale licences and direct aspects of resale price maintenance under the United States plan were discontinued in September, 1941. Numont Ful-Vue Corporation was thereafter used only to administer the Canadian licensing program.

obtained a retail licence, was audited in the summer of 1940. In September preparations were made for injunction proceedings but on September 26 Marsters wired Curry:

"Hold up any further discussion of Monarch audit with . . . [solicitor for Numont Ful-Vue] and ask him not to prepare papers for consent injunction."

Monarch was then merely warned respecting violations disclosed and promised to give written assurance of observance in future. Further complaints were received, however, and on March 25, 1941, Rickwood of Numont Ful-Vue wrote Marsters:

"...if we can, by means of an injunction or other methods, put Brown [Monarch] back into line we will find that the plan would work much better in this area."

No audit, however, was made at that time. Again, in September, 1945, Rickwood unsuccessfully sought permission to audit Monarch's books because of "general unrest of Ontario distributors".

4. Enforcement of Retail Licences

(1) GENERAL INVESTIGATION METHODS. In enforcing the Ful-Vue licensing scheme at the retail level, primary reliance was placed on complaints received from wholesalers and retailers respecting alleged offenders. In most cases the Numont Ful-Vue manager would ask for the explanation of the alleged offender, and, if not satisfied with the explanation, would send a letter of warning. The original plan had contemplated, as already indicated, a more aggressive and organized enforcement program. It was planned that evidence would be obtained by "shoppers" making test purchases from suspected retailers in key localities. Organized "shopping" of this sort was conducted on a very small scale in October and early November, 1939, and again in the spring of 1940. After 1940 there is no record of such action and special instances of continued violation were dealt with by personal visit and negotiation by the manager of Numont Ful-Vue.

(2) RETAIL SALES BELOW MINIMUM PRICES. MONTREAL, SEPTEMBER, 1939—MARCH, 1940. Curry wrote Marsters of Southbridge on October 21, 1939, reporting a conversation with the manager of the optometrical department of the T. Eaton Company, Montreal. The latter told him that Eaton's had found through its shopping service at least seven other retailers in Montreal selling below minimum prices. Accordingly Eaton's had reduced some of their prices below the Numont Ful-Vue minimum, from \$7.50 to \$6.00 in one instance, in accordance with their regular policy of meeting competition. Curry stated:

"... [Eaton's manager] expressed complete willingness to co-operate with us in every way saying that he wants to see the prices maintained, but that in accordance with their regular store policy he cannot maintain them unless we are able to enforce them on the other retailers. He advised me that whenever I told him that the other retailers were maintaining the prices, that he would immediately return to the higher prices.

This is a very serious situation in Montreal, particularly because as you know, the violations will spread very rapidly, particularly as soon as the word gets around that the T. Eaton Company is cutting the prices.

"...I believe we should immediately employ shoppers to work in Montreal and get the facts."

Marsters replied on October 25 stating that Wilson and Stewart, both of Southbridge, were going to Montreal in an attempt to "straighten this out". On the following day Stewart wired from Southbridge to Curry who was then in Montreal:

"C.O.C. [Cozzens] says get shopper today shop suspected accounts at once then you visit each account personally with evidence and stress next violation means cancellation considers this move vitally important..."

Nine "shopping expeditions" by a shopping service employed for the purpose were made in Montreal in the last week of October. It is not clear what results were obtained. Marsters wrote Curry, however, on November 14, congratulating him on this job:

"It would seem that it was well done, and the importance of your proper handling of T. Eaton and the others cannot be minimized."

Later in November and December a series of complaints was received by Curry from the secretary of the Quebec provincial optometrical association. Coffin of Consolidated, Montreal, wrote Reid of Consolidated on January 10, 1940:

"I had an interview yesterday with Lionel Hebert, secretary of the Association and he mentioned to me that they have made an investigation among the retailers and they have now 50 to 60 names of people that are not charging the prices set. He said that he wrote to Mr. Curry on this matter five or six weeks ago and nothing has been done so far."

Correspondence later in January shows that a more extended test purchase program in Montreal had been held up because of inquiries received at that time by Numont Ful-Vue Corporation from the Combines Investigation Commission. At the end of January arrangements were made, however, with a Toronto firm specializing in "shopping" of this sort. On March 8, Marsters wrote Curry suggesting that Curry now proceed with shopping, starting with "fifty \$1 calls in the province of Quebec". This was done and later in April warning letters were sent to Montreal retailers. The survey disclosed a number of "offences" on the part of Montreal retailers, including the following instances of sales below minimum prices:

Numont Ful-Vue Minimum Retail Price	Actual Price of Retailer when "Shopped"
\$ 7.00	\$ 5.00
12.00	9.00
12.00	10.75
12.00	10.00
7.00	6.00
7.00	6.50
12.00	8.00
15.00	12.00
7.00	5.00

Later in April Curry asked for authority to make similar test purchases in Quebec City, but the records do not indicate whether or not this was done.

(3) **HALE OPTICAL COMPANY, VANCOUVER, MAY, 1941.**—Late in April, 1941, Hale Optical Company, operating as opticians rather than optometrists, advertised all optical goods at half-price. The fact that Hale was one of Consolidated's accounts further complicated matters. On May 14, 1941, Lett, general manager of Consolidated, wrote his Vancouver manager:

"Every letter you write to this office we wish you would scrutinize carefully and under no circumstances use the words 'price control'. If you want to use the words 'patented items under licence', that is the proper way.

... the Imperial will be pushing the Optometric Association because they have nothing to lose and everything to gain. The same would apply to Hudson [Vancouver wholesaler]. You must bear that in mind and do not be too hasty in any decisions that are made there. After all our business is to get the business. Hale has been a thorn in the flesh of the Optometric Society and the Imperial Optical Company. You must not get anywhere into the position of throwing the ball for either of those people

We think it is very advisable for you to go up and see Hale and find out if he realizes the seriousness of the situation. Tell him that the Numont Corporation will take prompt action if he does not live up to his licence contract and you and we would like very much to prevent this.

....After you have given him a fair and friendly warning, we would be glad if you would wire us immediately as to what his answer or attitude is in regard to it. You may then destroy this letter."

Harvey, the Vancouver manager, replied that, despite pressure from local optometrists, he was continuing to supply Hale. Lett wrote again on the 16th:

"It may just be that Fred [Hale]...is Bolshevik enough to try and break this thing wide open. Now, if that is the case, he will have a fight on his hands with the Numont Corporation. Believe me, if they fight him, there will be nothing much left of his optical business because the first thing they will do, will be to cancel his licence which they may do without cause, according to the terms of it. They really do not have to have proof that he is violating it."

Writing again the next day, Lett said:

"....You have not said whether you went up and told Hale what we told you in the letter, asking him to lay off this Numont cut-price business. We want that done. As a matter of fact, we are not doing the right thing if we know that he has been cutting the prices on Numonts and still selling to him. He cannot get away with that, Leonard, and we have to see that it is stopped through the Numont people."

Harvey in the meantime had written again on the 17th to Lett:

"This morning Hambly [a local optometrist] was after me again wanting to know why, we being the representatives of the Numont Corporation that we had not acted. He also says that pressure will be brought upon us if we do not stop doing Hale's prescription work.

In Hale's words this is his story. He has no fight with the local Optometrists, but he has a score to settle with the Prescription Optical Co. [a retail outlet of Imperial Optical] and Harry Boyanner [local Imperial manager] in person, so if the Optometrists want to support Boyanner and the Prescription Optical then they will have to suffer. In other words Hale says that the Imperial rebate to the Doctors and he cannot do this, so he is going to get the business in another way until the rebate comes to an end.

Hambly says that on Monday all Numonts would be cut by most of the trade, but even if that is so, they cannot advertise the fact due to legislation that they passed themselves, and tied their own hands."

On the same day Hambly wrote Numont Ful-Vue, supplementing protests already made to Numont Ful-Vue by other Vancouver optometrists and by Imperial Optical and other wholesalers. He entered a strong protest against the inaction of Numont Ful-Vue and the support being given Hale by Consolidated. He ended his letter with the following:

"The local situation is developing to the point that as no action seems to be taken by Numont direct, that the licences are worth just about as much as the paper they are written on. That if Hale is able to carry on in this manner, then the licences are invalid, and anyone can cut the prices to suit their convenience, and that if some action is not immediately taken, that the men are going to meet this kind of opposition."

Rickwood of Numont Ful-Vue then flew to Vancouver with power to take action respecting the Hale case. He talked at length with local optometrists and with Hale. On May 21 he obtained from Hale a letter in which Hale promised that he would not again contravene the retail licence. We have no record of Hale having again sold licensed products below the minimum prices fixed.

The Hale incident was of an exceptional nature. There is no record of any other substantial retailer having so openly and on such a large scale violated the retail licence. It indicates, however, the sort of action which Numont Ful-Vue was prepared to take to ensure compliance and the manner in which it secured co-operation of optometrists and others when price levels were threatened.

(4) INDIRECT PRICE REDUCTIONS. Like wholesalers, retailers were forbidden to give special discounts except to specified classes of customers or to make indirect price reductions below minimum prices.

No discount could be given to consumers except a 20 per cent discount to doctors, members of the clergy, and employees of the retailer. Some retailers unsuccessfully sought permission from Numont Ful-Vue to give similar discounts, which they had given prior to the plan, to such classes as dentists, registered nurses, theology students, and university students generally.

During the first year of the plan Numont Ful-Vue warned four retailers against guaranteeing lenses for one year against breakage, stating "...this practice is not permissible because it constitutes giving a premium . . ." In one case, that of S. Weber of Toronto, a "violation" of this type contributed to the cancellation, referred to in the next section, of his licence by Numont Ful-Vue Corporation.

In March, 1941, Rickwood of Numont Ful-Vue pointed out to a Toronto retailer who had been making a 10 per cent refund to customers, payable in war saving stamps, that he would be contravening the licence if this refund resulted in customers receiving spectacles at a net price below the Numont Ful-Vue minimum.

(5) CANCELLATION OF RETAIL LICENCE OF S. WEBER, TORONTO. In one recorded instance Numont Ful-Vue cancelled a retail licence solely on the ground of disregard of resale prices. Following complaints from other retailers, S. Weber, a small Toronto retailer, was warned by Numont Ful-Vue on February 1, 1940, because he had sold Ful-Vue rimless with lenses for \$8 instead of \$12. Another warning followed, on April 18, 1940, on the ground that he had offered to replace broken lenses free. Following a third complaint, in May, that he had sold Numont Loxit with lenses for \$10.50 instead of \$16, Weber's licence was cancelled. More than a year later, on October 16, 1941, Rickwood wrote Marsters recommending Weber's reinstatement since "his livelihood might be affected." His name was restored to the list of licensees on October 20, 1941.

5. Failure to Take Action against Reported Infringers of Patents

Many complaints were received by Numont Ful-Vue from retailers about sales of spectacles of the Ful-Vue and Numont type by a few unlicensed retailers who advertised prices below the Numont Ful-Vue minimum prices. The best known of these is Ritholz Optical Co. of Toronto, which has branches in several Ontario cities and which imports much of its stock from its own factory at Chicago. Two other firms that conducted somewhat similar business were Salway & Rowe of Cardston, Alta., and Swadron & Banner, Toronto. The latter eventually became a Numont Ful-Vue licensee but the others did not. Despite numerous protests from licensees, Numont Ful-Vue Corporation took no action against these firms for infringement of patents or of trade mark registrations.

Swadron & Banner were not aggressive advertisers and did not cause much disturbance. On December 5, 1940, Marsters advised Rickwood:

"For the time being we suggest that you let the matter ride as is, just as long as Swadron and Banner's activities do not become a disturbing factor of importance among the other licensees."

No direct action was taken against this firm although Numont Ful-Vue made some unsuccessful attempts to find out where it obtained its supplies of frames and mountings, suspecting that they were being sold illegally by one or two Toronto wholesalers. Increased difficulty in obtaining supplies, together with persuasion by Rickwood, induced this firm to accept a retail licence in December, 1941.

Early in November, 1942, F. Nuttall, the secretary of the Alberta Optometrical Association, sent a strong complaint respecting Salway & Rowe. Its advertisements at this time showed a Ful-Vue type of rimless with lenses at \$7.00 for which the Numont Ful-Vue minimum was \$12.00; a Ful-Vue shell frame with lenses at \$8.50 for which the Numont Ful-Vue minimum was \$10.00; and even showed one type of Ful-Vue shell frame with lenses for \$4.50. Rickwood applied to Marsters of Southbridge for instructions and Marsters replied on November 16:

"You are correct that this type of advertising is pretty much in the same category as that of Ritholz, and any action in this connection should be along the same line, i.e., to find out if this concern is selling these two products under the trade name 'Ful-Vue', and billing them as such. If this should develop, then we have grounds for action.

In the meantime, you might write Mr. Nuttall that we are considering all the possibilities in this situation and that as a suggestion to his Association he might consider the possibility of testing some of this merchandise described as 'gold-filled' to see whether or not it complies with the Canadian Gold Marking and Stamping Act. I would be very much surprised if it carried the maximum quantities called for under this Act.

As for activity on our part, I wouldn't make a special trip to Cardston, or do anything affirmative at this time, but if the occasion should present itself later so that an attempt could be made to purchase some of this merchandise under the name 'Ful-Vue', I would then do so."

Rickwood then wrote the Alberta secretary on November 23 along the lines suggested. There is no record of any further action, although the records of Numont Ful-Vue show that this firm was advertising in the same way in 1944.

Throughout the period under review Ritholz Optical Company sold large quantities of Ful-Vue and Numont types of spectacles with no apparent fear of action against it by Numont Ful-Vue or American Optical. When the Canadian licensing program first began, Curry of Numont Ful-Vue wrote I. W. Wilson of Southbridge on May 18, 1939, enclosing a Ritholz advertisement illustrating a Ful-Vue type of frame and asking for advice as to the best method of putting a stop to such advertisements. Wilson passed this inquiry to H. C. Kimball, patent attorney on American Optical's staff, who replied to Wilson on June 1:

"I have talked this over with Mr. Styll [American Optical's chief patent attorney], and he is not in favour of a suit on the patents unless this is the last resort. The better way is to shop Ritholz and see whether it is their practice to substitute Ful-Vue constructions of their own manufacture when Ful-Vue is called for."

Kimball advised that attempts be made to obtain evidence for a trade mark action under the Ful-Vue trade mark.

The particular advertisement attached to Curry's letter showed rimless glasses of the Ful-Vue type complete with lenses at a retail price of \$3.45. The lowest price permitted under the Numont Ful-Vue plan for Ful-Vue rimless glasses, including lenses, was \$12.00. It was contended by Numont Ful-Vue, but denied by Ritholz, that this advertising was merely "bait advertising", that few sales were actually made at these low prices, and that the quality of goods sold at these prices was well below Numont Ful-Vue standards.

Despite complaints from licensees, Numont Ful-Vue at no time took any action against the Ritholz company in Canada.

In the light of these instances, the previous threats of patent impeachment action by Barlow of Montreal and Superior Optical of Toronto (see Chapter V), and the failure to take infringement action against Central Optical in 1939 (section 1 of Chapter IV), it is difficult to avoid the conclusion that Numont Ful-Vue and American Optical were not prepared to take direct action under the patents because of the risk that the patents might be found invalid by the courts.

6. General Enforcement Situation in Later Years

By the end of 1941 the Numont Ful-Vue plan had become firmly established. Its minimum price levels had become well recognized and its rules and regulations understood. The task of Numont Ful-Vue Corporation in ensuring compliance became thereafter progressively less difficult. From 1942 onwards its minimum prices were almost universally observed by both wholesalers and retailers and, as indicated in chapter XI, many retailers by 1947 were supplying spectacles at prices well above the fixed minimum prices.

Isolated exceptions to the almost universal rule of compliance of course existed. A few retailers, especially some of the larger opticians, admitted in evidence that although they generally observed the fixed resale prices they often granted discounts to persons not within the narrow discount classes recognized by the retail licence. Again, several wholesalers admitted occasional minor deviations from the recognized prices by way of special discounts. Generally in later years such departures from the rule were of little significance. Certainly after 1943 the records show only very isolated complaints respecting sales below minimum retail prices and only slightly more frequent complaints respecting wholesale price violations. This is particularly true with reference to frames and mountings; lenses used with patented goods presented greater opportunity for individual price reductions at the wholesale level until the lens arrangements described in the next chapter became well established.

During the last few years of the period under review, the Numont Ful-Vue office had as its principal enforcement problems at the wholesale level two practices, both of which indicate that general price levels were well recognized and that most of the deviations consisted of occasional special discounts.

The first such practice was "spindling", the trade description of the practice of a wholesaler delivering goods to a retailer in small quantities, even one at a time, and billing the retailer at the quantity rates for 25 or 50 when sufficient individual deliveries had been made. Obviously a violation of the wholesale licence, its existence could not be proved without audits and other careful investigation work. Although wholesalers generally recriminated each other for engaging in this practice, it apparently did not become sufficiently widespread to warrant Numont Ful-Vue Corporation taking any drastic steps to stop it.

The second type of discount violation was "group buying", which developed in Montreal between 1944 and 1946. The principal but not sole instance of this arose when, in order to get the benefit of the 5 per cent and 10 per cent year-end discounts and other quantity rates, a co-operative group of Montreal optometrists belonging to a professional study club began in 1944 to make all purchases from Consolidated Optical through one member of the group. This practice constituted an obvious infraction by the retailers of the retail licence and by the wholesaler of the wholesale licence. Other wholesalers complained vigorously to the Numont Ful-Vue manager, who finally investigated the complaints in October, 1944. The Consolidated manager at Montreal was instructed to discontinue the practice. He apparently did not do so since he felt he would merely lose the business to other wholesalers. He was finally, however, given a very stiff head-office warning in June, 1945, and the practice became less important until early in 1946 when Numont Ful-Vue again made some mild efforts to keep it within reasonable bounds.

These instances do not materially affect the general conclusion that in later years Numont Ful-Vue found it unnecessary to devote much effort to enforcement of the licensing scheme. Complaints continued to be followed up by inquiry by letter or, occasionally, by personal visit by the Numont Ful-Vue manager, but in no case in this period did Numont Ful-Vue find it necessary to do more than send a letter of warning. It is thus not surprising that at the end of 1946 and in early 1947 American Optical, as indicated in the next chapter, found it possible to make substantial changes in the formal structure of licensing control.

In this regard reference should also be made to the growing popularity of plastic frames after 1942. These frames, commonly called shell or zylonite frames, were almost all of the Ful-Vue type. Returns received indicate that in 1946 about 55 per cent of all frames and mountings sold were zylonite, compared with perhaps 15 per cent in 1939 and about 35 per cent in 1943. As already indicated in chapter IV American Optical did not succeed in securing quite as close control of United States manufacture of plastic frames as of patented metal frames prior to 1939. This situation apparently continued at least to some degree. Canadian wholesalers thus found themselves occasionally able to purchase zylonite frames in a variety of styles and types and often at prices materially lower than those charged by Consolidated Optical for comparable types. They could sell these readily at, and even materially above, minimum prices. Similarly, retailers could sell many plastic frames readily at prices well above established minimum prices because of consumer demand for special types and colours. In these circumstances, despite the fact that the manufacture of plastic frames was not controlled entirely, the increased sale of plastic frames did not imperil the established wholesale and retail price structures.

By 1944 wholesalers and manufacturers had come willingly to observe in all essentials the price levels established by the licensing controls. The elements of price competition most disturbing to American Optical and others interested in its elimination had disappeared or had been greatly reduced. At the retail level many factors, including wartime prosperity and the increased emphasis on the professional aspects of the optometrist's functions, had largely reduced the need for active enforcement of the fixed minimum prices.

VIII. RECENT DEVELOPMENTS RELATING TO PATENT CONTROL

1. Expiration of the First Ful-Vue Patent, October 25, 1945

The basic patent underlying the Numont Ful-Vue plan, the first Ful-Vue or Emons patent No. 274,841, which was reissued as No. 296,512 (described in Appendix I) expired on October 25, 1945. On September 17, 1945, I. W. Wilson, American Optical, Southbridge, wrote to Lett of Consolidated Optical:

"Undoubtedly there will be some questions asked concerning our Ful-Vue position when the Emons Patent expires this month. When such questions arise from responsible sources, they should be answered properly in order to prevent any misinterpretation of the facts or any misunderstanding about our future licence position. The answer formulated by the Legal Department is as follows:

'No changes will be made in Ful-Vue licences on the expiration of the Emons Patent on September 25, 1945,¹ as all Ful-Vue products manufactured by our licensees are covered by other patents included in the licences. The Emons Patent is only one of the patents applying to such products.'

American Optical and Numont Ful-Vue Corporation were under no legal obligation to inform their respective licensees of this event and apparently did not do so. As indicated in the letter quoted, they claimed that the expiration of this patent made no difference to their system of control and that all frames and mountings previously covered remained covered by the sweeping specifications of the remaining patents. This is a technical patent problem, and it is not necessary to question this claim for purposes of this report; but clearly the subject matter of reissued patent No. 296,512, having expired, is now in the public domain.

2. Impeachment Action by the Attorney General of Canada

Eight patents were relied upon by American Optical as covering the various types of Ful-Vue and Numont spectacles. On January 7, 1943, the Attorney General of Canada took action in the Exchequer Court under The Patent Act to have seven of these patents impeached or declared invalid on technical grounds. The Attorney General alleged that the patents should be impeached on the ground that the features patented did not disclose the degree of novelty and inventive ingenuity required by patent law to constitute valid and patentable inventions. This allegation was disputed by the patentees against whom the actions were taken. The proceedings had not all been completed by March 31, 1948, the status at that time being as follows:

Patent No.	Name of Patentee	Status of Action
(1) <i>Ful-Vue Patents</i> 296,512	Ful-Vue Sales Company.....	Patent expired October 25, 1945, and proceedings dropped.
316,329	Ful-Vue Sales Company.....	Exchequer Court order November 6, 1947, declared the patent "wholly invalid and void".
360,996	Ful-Vue Sales Company.....	Exchequer Court order November 6, 1947, declared the patent "wholly invalid and void".
331,430	American Optical Company:....	Patentee in 1947 filed with the Patent Office a declaration dedicating the patent to the public. Exchequer Court, September 29, 1947, dismissed defence motion for action to be dropped. Trial began October 29 and after several adjournments was adjourned to May 17, 1948.

¹This was the expiry date of the United States corresponding patent, Reissue Patent No. 17,994, and was doubtless used by Wilson in error. American Optical has confirmed that this statement also applied to the Canadian patent.

Patent No.	Name of Patentee	Status of Action
(2) <i>Numont Patents</i> 381,380	Uhlemann Optical Company...	Trial held October, 1947; judgment reserved and not yet delivered.
392,499	Uhlemann Optical Company...	Defence abandoned in 1947; Attorney General has not yet applied for entry of judgment, pending judgment in No. 381,380.
Industrial Design No. 58/12138.	Uhlemann Optical Company...	Defence abandoned in 1947; Attorney General has not yet applied for entry of judgment, pending judgment in No. 381,380.

The Attorney General of Canada also instituted on January 7, 1943, proceedings in the Exchequer Court against American Optical Company to have the trade mark "Ful-Vue" expunged from the register of trade marks, and against Uhlemann Optical Company to have the trade mark "Numont" expunged. These actions were stayed pending progress in the patent impeachment cases, but were reinstituted in January, 1948. They are based on common law and statutory law relating to trade marks. The Attorney General alleged that the trade marks were invalidated by the manner in which they have been licensed and used, and that they were in any event descriptive and not properly registrable under trade mark law. These allegations are, of course, disputed by the defendants.

See Appendix I for further details as to patents and trade marks.

3. Cancellation of all Retail Licences, February, 1947

On February 5, 1947, Numont Ful-Vue Corporation announced to its licensees that, effective that date, all retail licences were cancelled and would no longer be required. In making the announcement to the retail trade, Numont Ful-Vue Corporation stated:

"In the last eight years the true professionalism of examination, refraction, prescription, interpretation, fitting, re-evaluating, and servicing has been established on a solid basis from which it cannot be dislodged.

Professionalism, awakened to its opportunity, is taking the lead in demanding recognition that the professional factors are the all important factors in eye comfort and visual efficiency.

Numont Ful-Vue Corporation, in the firm belief that this trend is for the beneficial interest of both the public and Ophthalmologists, Optometrists, and Ophthalmic Dispensers, has decided that its Dispenser Patent Licences should be discontinued."

Wholesale licensees were told that thenceforth they could sell products covered by the licence "to any legalized refractionist or skilled ophthalmic dispenser."

The discontinuance of the retail licence was merely formal recognition of the fact, fairly apparent since at least the middle of 1945, that a licence system was no longer required to maintain retail prices. The retail enforcement activities of the Numont Ful-Vue Corporation office had virtually ceased.

4. Release of Standard Ful-Vue Goods from Wholesale Licence Control, March, 1947

An even more important development was the sweeping change respecting wholesale licences on March 10, 1947. Wholesalers were informed by Numont Ful-Vue Corporation on February 5 that:

"... effective as of March 10, 1947, the restrictions of your Licence Agreement are removed from the following products:

Ful-Vue Metal Frames

Ful-Vue Zylonite Frames

Rimless Temples and Ends of all descriptions."

The notice specified that the restrictions would continue to apply to all Numont-type mountings, including Numont, Arcway, Rimway, Toprim mountings and Zyl-Arc frames.

It is estimated, based on 1946 sales, that this suspension of control on Ful-Vue products removed minimum price control from about 62 per cent of all frames and mountings patented or unpatented, sold in Canada and left under control Numont-type goods representing about 30 per cent of all such frames and mountings.

When announcing the modification in the wholesale licence, Numont Ful-Vue Corporation gave no reason for the change.

5. Release of Standard Ful-Vue Goods from Manufacturing Licence Control, December, 1946

Prior to the change in the wholesale licences in March 1947, American Optical made a similarly basic change in the manufacturing licences under the Canadian Ful-Vue patents. It will be recalled that all United States manufacturers of substance, as well as Consolidated Optical and Imperial Optical in Canada, held manufacturing sub-licences from American Optical authorizing them to manufacture standard Ful-Vue frames and mountings, and that under those licences American Optical exercised close control of models made under the licences and of prices and sales terms applicable to the patented goods. On December 10, 1946,¹ American Optical removed all restrictions and conditions under these licences except that requiring payment of royalty on goods manufactured. The trade control features of these licences thus disappeared as of that date. No similar change was then made with reference to products of the Numont type manufactured under other sub-licences granted by American Optical.

All three actions, regarding manufacturing, retail and wholesale licences, occurred after the impeachment action had been instituted in the Exchequer Court and during the course of the investigation under the Combines Investigation Act.

¹United States Reissue Patent No. 17,996, one of the basic United States Ful-Vue patents, expired on this date. The similarity of date suggests that some change in the manufacturing licences under the United States patents may have occurred at this time, influencing a decision to change the licences under the Canadian patents.

IX. AGREEMENTS AND ARRANGEMENTS RESPECTING LENSES

1. Effect of the Numont Ful-Vue Plan

The inclusion of lenses in the Numont Ful-Vue plan automatically eliminated price competition after June 5, 1939, on close to 50 per cent of all prescription lenses sold at wholesale. This development may be contrasted with the vigorous price competition previously existing among Canadian wholesalers with respect to lenses in the lower-priced grades, and the more or less abortive attempts to reach price agreement prior to 1939. (See section 7 of chapter IV). The following segments of the wholesale lens market which were not directly affected by the plan or by arrangements applying to trade-marked lines were still characterized by vigorous price competition in certain areas:

(1) Prescription prices of lenses used with spectacles not covered by the plan, (about 40 per cent of those sold in 1939 and 10 per cent in 1946) especially "non-corrected" single vision lenses and fused bifocals.

(2) Prescription prices of lenses not sold already mounted or drilled or shaped for mounting exclusively with licensed frames and mountings. (Retailers could still buy the lower-priced Celex lenses, and despite the provisions of the licences, could themselves mount them in licensed goods).

(3) Stock prices of lenses, especially "non-corrected" single vision lenses and fused bifocals.

Concurrently with inauguration of the plan, the groundwork was laid for eventual filling of these gaps in the structure of control.

With reference to these uncontrolled segments it will be recalled that when the Numont Ful-Vue plan was introduced, some Quebec wholesalers were reported to be selling prescription lenses at prices as low as 45c per pair, mounted or inserted. Prices charged by some Ontario wholesalers were reported to be only 50 per cent higher. The lowest wholesale price of lenses under the Numont Ful-Vue schedules was \$1.65 per pair. The gap between the wholesale cost of uncuts and the wholesale selling price of the finished lenses was wide enough to permit considerable competition from the smaller houses. The following prices are based on Consolidated lists at the time the plan was introduced:

—	Cost to Wholesaler Uncut Lenses	Wholesale Prescription Selling Price (mounted or inserted)	Spread
Centex (1st Div. Spheres, per pair)	\$0.50	\$1.65	\$1.15
Celex (1st Div. Spheres, per pair)	0.30	0.95	0.65

Services in addition to merchandising covered by the spread are: (a) edging the uncut lenses to the shape ordered; (b) in the case of frames (rimmed), bevelling the edged lenses and inserting them in the frame; (c) in the case of mountings (rimless and semi-rimless), drilling each lens at one or two points and attaching by screws or rivets to the mountings.

2. General Agreements Respecting Lenses in 1939

Methods of pricing lenses had to be made uniform before uniformity of price could be achieved with respect to lens sales not covered by the plan. Prior to the Ful-Vue plan, although Imperial's stock price lists for single vision lenses were closely similar to Consolidated's, they were on a three column basis, showing (i) prices for single pairs, (ii) 2 pairs of a kind or 5 assorted, and (iii) 5 pairs of a kind or 10 assorted. Consolidated's lists had two additional columns, for 25 pairs and 50 pairs respectively. Both companies, prior to 1939, allowed large retailers the "Big Dealer" discounts of 25 per cent or 33½ per cent off third column for purchases over specified monthly totals, bringing net prices below Consolidated's "50 column" prices. Bausch & Lomb also had a three column price list from which further discounts were allowed. Most other wholesalers had only a one column list, from which widely varying discounts were given. The cost of Canadian lenses to non-manufacturing wholesalers was normally one-third off third column, or the same as the lowest "Big Dealer" price. A common basis of pricing obviously had to be secured before price agreements could be successfully reached.

As a step in this direction the new Consolidated price list was sent to at least some wholesalers about May 1, 1939, apparently as a result of the Numont Ful-Vue meetings. The following passage is contained in two mimeographed documents identical in text, one headed as a Consolidated branch bulletin and dated April 29, 1939, and the other dated May 1, headed "Memo Regarding Price Lists", and signed "Consolidated Optical Company, Ltd., R. F. Reid":

"In sending to you this price list, which is the complete line of items that our mutual contacts might affect, it is done in keeping with the conversations and the understandings under the new license plan.

We do feel in sending you this list it will be very helpful to you, not only having the set-up as at present, but you will no doubt publish your own list immediately, showing your own lines and your own numbers, as that is also an understanding of the new agreement, and when your lists are published we will be glad to have a copy for our files.

This list will also include the new uncut and prescription prices, and it is the understanding that the columns in our set-up will be absolutely followed without any reservation . . .

This list will go into effect on Monday, May 1st with us, and we hope sending you this one will be helpful to you in establishing your prices on the new basis on the same date."

On May 3, 1939, Reid wrote to his Montreal manager:

"The other jobbers all have our price list and there is no excuse for them making any statements that they don't know what the prices are. . . . We'll see whether Leber, Jobin and Coen are going to go around telling what they are going to do, not charge according to the price list, because if they don't, under the terms of the agreement we'll have recourse to making trouble for them and plenty. There is no reason why they should not adopt that price list in all the detail of it, not only on the lines like Numont and Ful-Vue, but everything else, prescription as well. If they don't, well there is just going to be trouble ahead, that's all."

On May 27, Atkinson of Consolidated wrote to the Edmonton branch:

" . . . I am sure that by the end of the month [of June] the other jobbers will fall in line and maintain our price policy on the 25 and 50 column, on lenses as well."

Reporting to his board of directors on July 7, 1939, Amsden of Bausch & Lomb wrote:

"At the time when the Numont Ful-Vue policies were discussed with all jobbers in Canada in Montreal it was agreed by the representatives of the various wholesalers that they would follow the American column set-up on all ophthalmic products."

The report went on to state that Bausch & Lomb and Kahn Optical followed Consolidated's lead in issuing such a price list, but that Imperial had raised some objections. It continued:

"Finally, through the interceding of Bausch and Lomb . . . Hermant has agreed to adopt new lens price schedules in their entirety on July 1st, . . ."

Acceptance of the list was delayed by Imperial's reluctance to follow, and meanwhile prices in Quebec remained unsettled. Amsden of Bausch & Lomb wrote to Moody of Rochester on June 24:

"We certainly started something yesterday when you told me the low on lenses would be 50 per cent off the Canadian list with the AOCO. in Canada unless something was done by the Imperial Optical Company very quickly."

Amsden passed on the information to Imperial, and described the results:

"Charlie Atkinson has just telephoned me that P.H. [Percy Hermant] has agreed definitely to adopt the entire five-column lens list July 1st, so we really feel that something has been accomplished . . ."

Writing his Fort William branch on July 4, Reid of Consolidated stated:

". . . Imperial are following the five column prices on lenses exactly as we are and the same prescription list. Likewise, Kahn and B. & L., so I think when the customers realize that it is a common list, it will probably be to our advantage."

On July 10, Amsden wrote the Soft-Lite Lens Co. Inc., New York:

"All of the optical wholesalers around Toronto agreed to adopt a five-column lens price list on July 1st, and as far as we know all of them did so."

On July 17 Reid wrote his Fort William branch again:

"Note you had a talk with the Imperial man when he was in Fort William and that was all right, although, as you know, we have no very common ground with them, and you must be careful in talking to any opposition people that you do not give them any information. We are working on a basis of common practices and price lists, but let them look to their Head Office for their information, except in a case where you should get clearance in your direction where we all ought to be the same."

Conditions in Quebec, however, were still unsettled, and remained in this state through the summer of 1939, when Commercial and Central were reported to be selling below list. On September 18, 1939, LeBer of National Optical, Coen of Commercial, Jobin of Central and Coffin and Bamford of Consolidated met in Montreal to discuss lens prices. Minutes of the meeting read:

"It was agreed that for the Island of Montreal only, . . . the lowest prices for . . . prescription will be . . . as listed on . . . the Rx section of Consolidated pocket price list. It was further agreed that all extras as listed . . . as now applying to Super Centex lenses will apply to the Celex list as agreed to above . . . lenses not listed as Celex will be charged at Super Centex price . . ."

Similar agreement was reached to follow Consolidated's price lists for uncut lenses.

The newly accepted price lists were not rigidly observed by all wholesalers. Several, including especially Central Optical, continued to sell lenses at lower prices. The major companies, however, held fairly well to the various agreements.

3. Arrangements Respecting Fused Bifocals

Reference has been made to the very keen competition respecting fused bifocal lenses. The situation received special attention at the Numont Ful-Vue meeting on March 10 and 11, 1939. Fused bifocals were selling as low as \$1.50 in Quebec and it was feared that this price might spread into Ontario. Amsden reported:

"Apart from the adoption of the \$2.70 and \$3.20 prices for fused bifocals in Numonts and Ful-Vue products, the meeting got together and agreed that beginning April 1 next, and continuing for at least sixty days, no wholesaler . . . would supply Fused Bifocals on Rx at lower prices than \$2.00 for spheres and \$2.50 for compounds. . ."

The mimeographed bulletins issued by Consolidated on April 29 and May 1, refer to this:

"There was one item discussed at the meeting that is not in this list, namely cheap fused bifocals, on which there has been some uncertainty in price among the jobbers, and it was understood that there could be a cheap bifocal at \$2.00 for spheres and \$2.50 for cylinders, even though it was not applicable to be used with Ful-Vue Numont or patent construction merchandise....it was agreed that from May 1 the new basis of the \$2.00 and \$2.50 price would be put in effect...."

Jobin of Central Optical refused however to abide by the \$2.00 and \$2.50 prices and continued to sell at \$1.50 and \$2.00. Other wholesalers followed suit when competition made it necessary.

When Montreal wholesalers met on September 18, 1939, bifocal prices were again discussed:

"It was also agreed that....the lowest price....for bifocals of the fused type will be \$2.70 for spheres and \$3.20 for cylinders...."

An agreement between Consolidated and Imperial that the two companies would not sell fused bifocals in the Vancouver area had been made at some time prior to January 17, 1940, when W. R. Lett, then manager of Consolidated's Vancouver branch, wrote Reid:

"After consulting with the other wholesale houses here at the first of the year regarding the cutting out of fused bifocals in British Columbia, on the suggestion of the Imperial, and in view of the fact that the Central Optical Company from Montreal....circulated the whole of the west on prescription work specially, we thought it would be a bad time to cut out the fused bifocal line."

Reid replied on January 19:

"I don't know on what basis you had a meeting out there to have discussed whether you would use Fused Bifocals or not because that is not a matter of the local Vancouver office. We agreed with the Imperial here that we would not sell Fused Bifocals out there, and now you people go in on your own hook and want to put them back in again. We haven't any objection at all to doing it ourselves except that it means putting in a stock again of Fused Blanks out there, but you did not say definitely in your letter just what they proposed to do, what the prices are going to be.

... I thought it had been cut out ever since we took it up some time ago, not a matter of being discussed now."

The Montreal agreement of September 1939 was not maintained for long, and by mid-1941 had become largely inoperative. Valentine of Maritime Optical wrote to Phillips of Canadian Optical Service, on June 28, 1941 (translation):

"It has been agreed at Montreal that beginning July 1 next prices for bifocal lenses will be the following:

For spheres \$2.00; for compounds \$2.50."

By the summer of 1944 the prices of \$2.70 and \$3.20 for fused bifocals had become general. Increased labour costs and the disappearance of Central Optical from the Montreal market were factors which assisted in the maintenance of these levels. Even these prices in 1944 were not satisfactory to some in the trade and efforts were made to shift more buyers to more expensive bifocals. On August 4, 1944, Hermant of Imperial Optical wrote LeBer of his Montreal subsidiary:

"I also discussed with him [Lett] the matter of instituting a higher price on Fused Bifocals. I suggested that if they want to make a differential, he can say that the \$2.70 and \$3.20 being second quality blanks, they can be supplied in 8 or 10 days, whereas the first quality can be supplied at once...."

On October 19, 1944 Hermant again wrote to LeBer indicating that Consolidated had followed the suggestion:

"In speaking to Mr. Lett this morning he mentioned that they take 9 days for the filling of Rx's in Celex quality Fused. In other words they want to discourage the sale of the Celex and try to sell the regular \$4.50 and \$5.00 Bifocals.

Mr. Lett said he was going to Montreal and would likely be 'phoning you. Perhaps you can come to some understanding about this...."

When optical lenses were released from wartime price control in July, 1946, prices of fused bifocals were increased almost at once. Consolidated took the lead, after discussing the situation with Imperial. Writing to LeBer on July 27, 1946, Hermant said:

"I think I have already advised you that Consolidated have decided definitely to raise their price of the Economy Fused Bifocals on August 1 from \$2.70 and \$3.20 to \$3.50 and \$4.00.

I don't know whether Coffin [Consolidated] has taken this up with the other houses to see what they are going to do about it. I told them of course that you would be glad to follow suit...."

Hermant went on to suggest that Consolidated might be able to persuade General Optical to follow, and that Bausch & Lomb and Commercial seemed likely to fall in line. Hermant asked LeBer to ascertain the intentions of the other wholesalers. LeBer, in the meantime, had heard the news and according to his letter to Hermant of July 27, had anticipated the latter's request:

"... I have 'phoned every wholesaler many times to definitely come to an agreement between ourselves...I have 'phoned also to Quebec City Maritime Opt. and also to Three Rivers Mr. Bourbonnais...on Monday...[all wholesalers in] Quebec including Quebec, Sherbrooke, Three Rivers will have only one price for Fused Bifocals...."

On July 26, the day before LeBer's canvass, Coen of Commercial Optical reported to his Toronto branch (Colonial Optical) that the change would be general in Montreal, and signified his willingness to follow in Toronto should the increase be general there. Valentine of Maritime Optical wrote to Coffin on July 31 (translation):

"You proposed to us that prices [of fused bifocals] be changed beginning the 29th of this month; we have been glad to join our efforts with those of our colleagues and competitors in giving our consent to the agreement, which we wish to respect."

LeBer reported from Montreal to Hermant on August 6 that all wholesalers had put the increases into effect.

No departure from the agreement was recorded in Amsden's report on September 9, 1946 to the directors' meeting of Bausch & Lomb. Regarding this price change the report reads:

"On August 1 the Consolidated Optical Company issued a new price list on fused bifocals...Shortly after this new price list was issued, all other wholesalers in Canada adopted the Consolidated price list with the exception of Bausch & Lomb, Toronto, who as yet have nothing to offer in this fused market."

The fused bifocal, the low-price item, had disappeared from Consolidated's prescription price list issued late in 1946. In this list, the more expensive Kryptok brand of fused bifocal was somewhat reduced in price from the levels previously prevailing.

4. The "Non-corrected" Single Vision Lens Problem

As already indicated, elimination of competition in stock and prescription lenses of the "non-corrected"¹ type was one of the principal objectives being sought by the trade. In the earlier years this objective was not fully attained; agreements were repeatedly made only to be broken. Gradually, however, aided

¹ "Corrected" and "non-corrected" are generic terms used in the trade, and are somewhat misleading to laymen. The terms refer to the use of base curves which will reduce blurring of objects seen through the outer portions of the lens. Technically, all ophthalmic lenses are corrected, and in practically all, the correction is imposed on a curved base. Ideally, each power of lens would have a different base curve, but it is not practicable to manufacture lenses in this way. Instead, a number of base curves are used, each approximately suitable for a certain range of powers. In "non-corrected" lenses, not more than four base curves are used. In "corrected" lenses, as many as 15 may be used, so that there is a correspondingly closer approach to the "ideal" curve for most of these lenses. The difference between "corrected" and "non-corrected" is not important, however, for many lenses in the low powers.

by wartime shortages and development of export trade, those most interested, especially Consolidated Optical with Imperial Optical playing a principal supporting rôle, secured by 1946 substantial lessening of price competition.

Until well on in 1945 there were in most areas two generally recognized price lists, one based largely on Consolidated's "Centex" list and the other on its "Celex" list. The latter prices were as much as 50 per cent lower on prescription and 40 per cent lower on stock. Celex lenses, according to Consolidated and Imperial production standards, were supposed to be "second quality" Centex lenses. In fact, however, in at least the earlier years Centex lenses were frequently sold as Celex and at Celex prices. For example, Consolidated's records show that the company produced in the three years 1938-40 only half as many Celex as it sold; that it produced about 165,000 pairs and sold over 340,000.

Although lenses which were actually graded at the factory as Celex or Premex (Imperial's brand of Celex) contained minor imperfections, most of them could be used by a competent technician in filling a prescription. A dispenser recognized as one of the most skilled in Canada testified that all but 5 per cent of "second quality" or Celex uncut lenses could be used to make a perfect prescription lens. The difference in prescription lenses was even less apparent.

An official of one of the optometrical associations testified:

"At the time [of the Numont Ful-Vue licence agreement] I sent my prescriptions to a laboratory and there was no way by which we could tell whether it was Celex or Centex that was put in."

In 1939, two developments, the Numont Ful-Vue plan which required use of lenses at the Centex price in patented spectacles, and the outbreak of war which stopped imports of European lenses, limited materially both supply and demand in Canada for the Celex grade. So long, however, as Celex lenses were freely available from the manufacturers, a Celex prescription list was used widely by many wholesalers, particularly in Quebec and the Maritimes.

5. Elimination of "Celex" Lenses in Western Canada

In Western Canada competition was less intense than in the East. West of Winnipeg in 1939 only Consolidated, Imperial and Hudson were operating. Hudson had no branch outside of Vancouver until 1942 and, until 1944, Kahn had no branch west of Winnipeg. The Celex prescription list had apparently been withdrawn, by agreement, from general use in British Columbia by May, 1939. Later in the year Consolidated and Imperial agreed that the entire Celex list, both stock and prescription, should be withdrawn west of Winnipeg. On October 7, 1939, Reid wrote to Tulloch of his Winnipeg branch:

"... we had a conference with Hermant [Imperial] yesterday and we could see no reason to not discontinue them [Celex] in the West . . . it will apply to Regina, Saskatoon, Edmonton, Calgary, Vancouver, Victoria and Nelson . . ."

L. Petch, Regina branch manager for Consolidated, wrote Reid on October 16:

"We have arranged with the Imperial here to discontinue the Celex beginning November 1 . . . We will use up our stock of Celex as quickly as possible, and will then order only Super Centex and Tillyer for stock . . ."

Winnipeg was excluded from the agreement, primarily because of uncertainty of Kahn's co-operation. A second reason is disclosed in a letter from Consolidated's Winnipeg manager to Calgary, October 17, 1939:

"When I was in Toronto I discussed with Mr. Reid the possibility of discontinuing Celex lenses in the West and we arrived at the conclusion . . . to discontinue them at our Branches except in Winnipeg where that owing to the fact that the Optometric Association had made a contract with the Relief Committee for supply of lenses at Celex prices for the year 1939 it was felt that they could not discontinue them in Winnipeg and it has been my job to take up with the Association the possibility of having this contract changed . . . for the year 1940."

An attempt was made to bring Kahn Optical into line generally. On October 17, 1939, Reid wrote to Tulloch at Winnipeg:

" . . . Syd. Kahn sat in a meeting last Saturday, which may change this whole lens set-up—corrected lenses, Centex and seconds. If this thing goes through . . . each jobber will have the same price list, without any question about it"

Again on October 20, 1939, Reid reported:

"Now, they [Kahn] have reasons to want some advantages from us and they are not going to get much sympathy if they don't straighten out that situation in Winnipeg and follow the lens prices in accordance with our set-up."

By March, 1940, plans were made to withdraw Celex from Winnipeg. Tulloch had the co-operation of Imperial's Winnipeg manager, but was still uncertain of Kahn Optical. The plan was carried out at least partially at this time, but apparently only temporarily. Kahn Optical early in 1942 agreed to co-operate more fully in Winnipeg. Kahn wrote his Winnipeg manager, on May 26:

" . . . I advised you that no more lenses were to be sold in uncut form other than at first quality prices, that is to say, super-centex prices . . .

I also told Consolidated and Imperial that we would co-operate with them on this new set-up and we must not overlook the fact that we are more or less dependent on them at the present time for our supply of lenses."

Writing on September 28, he again expressed his anxious respect for the agreement with his suppliers:

" . . . Now, you were advised last spring when Celex were taken off the market, that the only lenses available would be Centex and that the price would be exactly as per the Consolidated list . . . we agreed not to cut this price, and we like to stick to our agreement, our given word. In addition to this, we could very easily prejudice our source of supply . . ."

From this time forward Celex lens price lists did not appear in Western Canada.

6. Arrangements in Eastern Canada respecting "Celex" Lenses

For some time after 1939 conditions in Montreal retarded agreement on "non-corrected" lens prices. Central Optical published a list concerning which the manager of the Moncton branch of Consolidated wrote to Lett on January 8, 1940:

"It certainly is definitely breaking away from the agreement . . ."

That a measure of agreement had been restored, however, is indicated by a letter from LeBer to Phillips of Canadian Optical Service, September 16, 1941, (translation):

"I enclose the new prescription price list which will be in force throughout the Dominion of Canada beginning Monday, September 22nd. All houses in Montreal as well as those in Toronto have accepted this list as being the lowest."

An agreement among Montreal wholesalers regarding prices of uncut lenses, when sold in single pairs, is recorded as having been reached in January, 1942. There is no direct evidence of this agreement having been general throughout Canada, although in May, 1942, Consolidated and Imperial were reported to be using in Ottawa a common list, drawn up on the agreed basis.

(1) ELIMINATION OF CELEX UNCUT LENSES TO RETAILERS. On May 4, 1942, Consolidated advised its branches that uncut lenses at Celex prices would no longer be sold to retailers. Three days later Coffin, Consolidated's Montreal manager, reported to Lett:

" . . . Central, Commercial, National and ourselves have all fallen in line since Monday, May 4th, and have discontinued the uncut Celex to anybody on stock . . ."

Valentine of Maritime Optical accepted the plan at once. Commercial's Ottawa branch (Colonial Optical) was instructed to sell stock lenses only at Centex

prices after Coen of Commercial had satisfied himself that Imperial and Consolidated were following a similar policy. Reporting a meeting of the smaller wholesalers in Toronto, the manager of Commercial's Toronto branch (Colonial Optical) wrote to Coen on June 12, 1942:

"The wholesalers had a meeting on Wednesday evening to discuss the Celex lens price. It came out at the meeting that most of the houses are still selling a few Celex uncuts but in most cases they are advising their customers that they haven't any stock of Celex quality to supply"

On July 21, 1942 Coffin wrote to Lett complaining that Celex lenses were being sold to retailers by National Optical. Lett replied on the following day:

". . . We will stick to our program as we agreed, until we find that it is being broken and when we do, we will open up. You . . . no doubt have grounds for thinking that Celex lenses are being sold on a 50-50 basis with Centex . . . We have taken this up with Hermant [Imperial] and he will make a report on . . . [several accounts] as a direct answer to our question as to whether they are selling on the 50-50 basis."

Writing to a Windsor, N.S., customer on February 1, 1943, Prevost, then manager of Central Optical, explained that no more Celex lenses were available:

"This decision has been reached some time ago at a meeting of the 'Wholesale Manufacturers'."

Coffin complained, writing to Lett on October 26, 1943:

"I don't know who is chiselling on uncut lenses but there is certainly someone going around offering Celex"

By the end of 1944, both Consolidated and Imperial found it necessary to reaffirm the agreement. On January 9, 1945, Hermant wrote to LeBer:

"I had a talk with Lett this morning. We both agreed that the time has come to definitely eliminate Celex or Premex lenses in the Uncut form to our customers. It is the old story, of course, . . . their men blame you for selling Premex, and of course you blame them for selling Celex. However, I pointed out to him that by making Celex or Premex lenses available freely to the retailer, they have the greater incentive to buy their own edging plant and do their own work . . . That seemed to appeal to him and it was definitely decided that as of January 12th . . . no more Celex or Premex lenses will be sold in the Uncut form"

Writing again on January 25, he stated:

"Mr. Butler is in town today . . . I explained to him that we expect cooperation from him in supplying the retail trade with first quality lenses only. Surely they can afford to pay first quality prices on uncut lenses at the prices they are getting today from the public. He seemed agreeable to this."

(2) ELIMINATION OF CELEX PRESCRIPTION LIST. The Celex prescription list was next to be eliminated. The move had been discussed by Imperial and Consolidated at the time of the above agreement on uncut lenses. Writing to LeBer on January 12, 1945, Hermant said:

". . . on the phone the other day with Mr. Lett, he mentioned also that since we are going to cut out Premex and Celex lenses in the uncut form in Montreal, could we not cut out the Rx Celex as well, so there would be just the one price for lenses . . ."

Not until August, 1946, however, was this done. On August 1, Consolidated withdrew all Celex prescription lists to retailers. On the same day National Optical of Montreal (Imperial subsidiary) was informed of the change by Consolidated's head office, and Maritime Optical was informed by Consolidated's Montreal branch. On August 7 LeBer reported to Hermant that, following telephone discussions with all Montreal wholesalers,

". . . it has been agreed that starting tomorrow all celex list is eliminated."

LeBer added that the manager of Butler Optical could not be reached, but that Consolidated intended to pursue the policy even if Butler would not follow. The letter reads:

"Mr. Coffin told me also that if Chevrier [General Optical] or Butler do not . . . behave he will simply cut off their supply"

We have no proof that such a threat was actually made to Chevrier and Butler by Consolidated, but, as all wholesalers realized, such withholding of supply was possible. Both Imperial and Central had been subjected to such sanctions in earlier years. When Commercial was suspected of cutting lens prices a few days later, LeBer reported to Hermant and stated:

" . . . Coffin wrote immediately to Lett emphasizing the necessity of cutting Coen immediately from Celex supply . . . I believe Mr. Hermant that you should write a letter yourself to Commercial. . . ."

LeBer was told by Hermant that the matter would have to be settled locally. There is no evidence of punitive action toward Coen by Consolidated or Imperial, or that any further complaints were received that sales were being made below list.

7. Lessening of "Celex" Competition between Manufacturers

It is unlikely that "second quality" lists could have been withdrawn at the wholesale level if domestic lens manufacturers had continued to supply their Celex and Premex uncut lenses freely to jobbers, or if Canadian wholesalers had been in a position to continue importing low-priced lenses from Europe and Japan.

Agreement between the two Canadian manufacturers with respect to the sale of such lenses appears to have been effective in 1940. In a letter to an official of American Optical Company on February 22, 1940, Reid of Consolidated, speaking of Imperial's prices to Canadian wholesalers, said:

" . . . both by their word and with us, while the agreement is only verbal, they adopt our Celex list."

Apart from their agreements with other wholesalers to eliminate sales of "second quality" lenses to retailers, Consolidated and Imperial appear to have arranged later to restrict supplies of Celex and Premex lenses at the manufacturer level. On September 23, 1942, Atkinson, sales manager of Consolidated, wrote to Lett:

"When we eliminated the Celex uncuts to jobbers, unless they purchased two thirds of the Centex, we understood it included all lenses in that quality . . . our opposition [Imperial] are supplying second quality rough toric cylinders, and not maintaining the one-third and two-thirds setup."

Writing to LeBer on August 4, 1944, Hermant said:

"I also discussed with him [Lett] the impression we got that they are a little more lax on the matter of supplying Celex lenses. He tells me that their policy has not yet changed, and that the wholesaler is still supplied on the basis of $\frac{2}{3}$ and $\frac{1}{3}$ and the retailer first quality only, but I sensed from his statement that they make exceptions because they are sometimes overstocked on some Celex quality lenses."

Shortly before January 1, 1945, a Three Rivers wholesaler through error received from Imperial a shipment consisting entirely of Premex lenses. Hermant told LeBer how to prevent such errors and added:

"You will have to explain this mixup to Coffin [Consolidated, Montreal] . . ."

8. Effects of Restriction of Sales of "Celex" Lenses

Celex lists for prescription or uncut lenses, long since eliminated in Western Canada, did not reappear in the East after August, 1946. Wholesalers were able to buy a few uncut Celex lenses and may have sold them occasionally to favoured customers. Any Celex uncuts not resold to retailers were presumably used, to the extent possible, by wholesalers in prescriptions at Centex prices.

Removal of the Celex prescription list in August, 1946, raised costs very sharply for optometrists and others who had formerly taken advantage of the lower prices. The change also made the Numont Ful-Vue plan, which

required that Centex prices be charged for lenses inserted in patented mountings, less vital to the restrictive program. This may have been a factor in influencing the abandonment of the Numont Ful-Vue retail licences in February, 1947, and the modification of the wholesale licences in the following month.

Among optometrists, opticians, oculists and non-manufacturing wholesalers there was a striking unanimity of opinion that a decline in quality of Centex lenses had accompanied the Celex restrictions. An optometrist of twenty-five years' standing stated:

"We used to have what we called the supercentex quality and what you would call a good lens; they had no defects; and we had . . . the celex. But since four or five years, celex disappeared, or they do not want to give us celexes, and they forced us to take the supercentex because they said there were no more celex. Checking up the lenses all the time on the lensometer, I found that supercentex were not centred any more than celexes that we used to have before, but the price was the supercentex price."

Inexperienced factory labour doubtless must share some responsibility for this, but it is fair to assume that many lenses of the kind formerly sold at Celex prices have been sold at the higher Centex prices. Both Imperial and Consolidated claimed that in recent years most Celex lenses have been sold in the export market and have thus contributed to Canada's trade development. This, however, hardly makes less serious from a competitive point of view a joint arrangement designed to eliminate a lower priced article from the domestic market.

9. Price Increases by Wholesalers in September, 1946

When price ceilings on lenses were removed in July, 1946, the fused bifocal, as already noted, was the first item to show a price increase. New single vision price lists appeared in September, followed by the familiar pattern of agreement among the Montreal wholesalers. LeBer wrote to Hermant on September 24, 1946:

"I have received the new Consol price list 'uncut'. I immediately contacted Mr. Coffin and he tells me that the list is coming to force in Montreal the 30th, and that he has phoned Mr. Coen and B. & L. and that they are following suit so therefore the 30th, the National will do likewise . . . Coffin told me that he will see Mr. Chevrier of the General and Butler about the new price list."

Writing on September 27, LeBer asked White, an officer of Percy Hermant Limited, to give September dating to an invoice to a customer for uncut lenses "so as to avoid any possible conflicts with the Consol."

Advances in prescription prices took place in October, the Consolidated list appearing about the middle of the month. Before this list was mailed to customers, Imperial was given an opportunity to prepare a substantially identical list. In a bulletin to branches and salesmen on October 18, 1946, Hermant said:

"The enclosed is a proof of our prescription price list which is coming into effect . . . October 21st. It is practically the same as the one sent you the other day, which we obtained from Consol . . . By this time we believe that the Consol have already mailed out the Rx price lists to their customers . . ."

10. General Relationship between Consolidated and Imperial respecting Lenses

In all the Montreal lens agreements the representative of either Consolidated or Imperial took the lead. Since retailers in either Montreal or Toronto might be expected to take advantage of any material price differential available in the other city, particularly in stock items, Imperial and Consolidated must have sanctioned the Montreal agreements in the knowledge

that other Toronto wholesalers were following their price lists. Such compliance on the part of other Toronto wholesalers would not necessarily arise from agreement by them on each new change; there was a general understanding that the Consolidated and Imperial lists would be followed.

Disappearance of European lenses from the Canadian market and the duties applying to United States lenses gave Consolidated and Imperial substantial control of the lens market, especially of the most widely sold types of lens.

The price policies of non-manufacturing wholesalers for such lenses were, in fact, governed largely by their cost of uncut and semi-finished lenses, which cost was determined by Consolidated and Imperial. Bausch & Lomb, which imported all its lenses and largely refrained from selling lenses of the lower priced grades, at all times was selling at prices equal to or slightly higher than Consolidated's lists and was naturally glad to take advantage of any price increases effected by the others.

Consolidated and Imperial were thus able to direct lens price policy in the trade, particularly after the disappearance of Central Optical, with the knowledge that their wholesale prices would be generally adopted. Special arrangements such as those in Western Canada and in Montreal appear to have been incidental to the general understanding. On July 13, 1942, R. J. Henders, stock supervisor of Consolidated, wrote to Lett:

"Imperial Optical Co. have their new Rx price list printed to conform with the list, the proofs of which you submitted to Mr. Stewart [of American Optical]. They are anxious to get this into effect and I have asked them to hold them up until you come home and try to get the okay through from Southbridge."

The close co-operation indicated by this quotation appears to be typical of the conditions under which, during the years 1939 to 1946 inclusive, lens price competition at the manufacturing and wholesale levels became insignificant.

Consolidated argued strongly in the course of the investigation that it acted entirely independently of others and entered into no agreements respecting lenses. Imperial contended that it also acted independently, although it admitted that it followed the lead of Consolidated in making changes in price and policy. It is true that Consolidated was apparently the price leader, that no change was made until Consolidated made it, and that Imperial and the others followed suit. The evidence cited in this chapter shows clearly, however, that Consolidated did not merely take the lead without concerning itself about the policies of others and that Imperial played no merely passive role. Consolidated, on the contrary, by agreement, by persuasion, and sometimes by at least implied threats, took aggressive action to ensure that Imperial and other manufacturers and wholesalers followed its prices. Although Imperial in 1939 participated in general lens arrangements with Consolidated only under pressure, in later years the company actively urged Consolidated to make changes; and, when they were made, played an active role, directly or through National Optical, its Montreal subsidiary, to ensure that smaller wholesalers fell into line.

X. WHOLESALING UNDER THE RESTRICTIVE ARRANGEMENTS

1. Effects on Wholesalers Selling United States Frames and Mountings

It will be recalled that 55 per cent of frames and mountings sold in Canada in 1939 and 45 per cent in 1946 were manufactured in the United States. Canadian wholesalers, other than Consolidated Optical, have been accustomed to purchase most of their frames and mountings from United States manufacturers. Prior to 1939 their position had been difficult. Competing at wholesale with Consolidated Optical, the sole Canadian manufacturer of frames, they were faced with discount arrangements such as the "Big Dealer" discount which permitted large retailers to purchase from Consolidated as cheaply as the wholesalers could. At that time there was only one minimum price for Ful-Vue manufacturers in the United States, since the "A" and "B" differentials were not established until January, 1939. Until 1939, however, barely 50 per cent of frames and mountings sold were of the Ful-Vue type and Canadian wholesalers could often obtain from United States manufacturers some lines of regular or non-Ful-Vue frames and mountings at prices lower than American Optical's standard prices. With the great increase in demand for Ful-Vue goods from 1939 onwards, the restrictive conditions imposed on manufacturing licensees became progressively more significant.

Even under fully competitive conditions the independent Canadian wholesalers would have been seriously affected during the war years by exchange restrictions, shortages of materials in the United States and stoppage of imports from Europe. Many of them claimed, however, that the Numont Ful-Vue plan, including the manufacturing controls in the United States, fixed manufacturing and wholesale prices which made it difficult and sometimes even impossible for them to sell American goods, particularly in quantity lots, at a profit in Canada. They contended that the plan, conceived and administered by American Optical, unfairly favoured Consolidated Optical and wholesalers buying from it and discriminated unfairly against others. In part this complaint is an aspect of the more general complaint that American Optical fixed wholesale prices that made it difficult for non-manufacturing wholesalers to compete with the large manufacturing wholesalers. In part it refers to the discrimination allegedly arising from refusal of American Optical to permit in Canada price differentials between the products of "A" and "B" manufacturers. Principally, however, it relates to the non-competitive conditions established in the United States, their effect on the Canadian importer and the pricing of Canadian-made goods slightly below the laid-down cost of United States goods.

It will be recalled that early in 1939 American Optical established with reference to the United States market two classes of manufacturers under its Numont and Ful-Vue manufacturing licences. Group "A" included about half a dozen of the larger American manufacturers and Group "B" the rest. Group "A", manufacturing goods of slightly different design and of apparently slightly higher quality were required to sell at prices slightly above those fixed for Group "B". The price differential was approximately 10 per cent, giving the smaller manufacturers an opportunity to compete against the greater prestige and reputation of the larger manufacturers. On sales to Canada, this differential was not permitted; the manufacturers' minimum prices were fixed at approximately the "B" level for both groups. Consequently Group "B" goods had to be sold to Canadian wholesalers, and by them to Canadian retailers at prices approximately the same as those applying to Group "A" goods. This

increased the difficulty of selling Group "B" goods in Canada in competition with Consolidated and Group "A" manufacturers. Noteworthy among the wholesalers accustomed to buy from Group "B" manufacturers was Commercial Optical, which commonly bought from Universal Optical, Providence, R.I. Reference has already been made to Universal's unsuccessful attempts to have a Canadian differential recognized. Commercial's position in this regard is indicated in a letter it wrote to Universal Optical on August 21, 1940:

"...there is only 5 cents difference between Numont and Arcway [the group "B" type of Numont], and the Numont, of course, has the streamlined temple while the Arcway has the conventional temple which by itself is not enough to enable a Canadian jobber to sell Arcway in competition with Numont."

American Optical insisted on strict observance of its manufacturing sales rules. For example, Bausch & Lomb of Canada was prevented from selling goods made by its parent company at prices lower than those at which similar goods could be purchased by Canadian wholesalers from the United States. Amsden of Bausch & Lomb wrote Imperial Optical, Winnipeg, on June 19, 1939, referring to changes in his Ful-Vue prices:

"These changes were brought about by American Optical Company's insistence that we do not sell our jobbers in Canada on a basis on which it was more advantageous for them to buy from us than it would be to buy from the U.S.A. . . ."

Again on January 24, 1940, he wrote National Optical, Montreal, respecting Numonts:

"...our friends from Southbridge have demanded that we charge the jobbers in Canada the same laid down costs for Numont mountings for which they could import Bay State, New Jersey, etc...."

It will be recalled that the manufacturing licences fixed prices on sales to Canada which resulted in United States goods costing Canadian wholesalers slightly more than similar goods purchased by them from Consolidated Optical. Writing to Shuron Optical on August 3, 1940, Kahn Optical stated:

"You may or may not remember that when our government brought down the last budget they instituted a new War Defence Tax of 10 per cent on all imports. It was a tight enough squeeze selling Numonts before at \$3.45 [coral], the price put in force over here by the Numont Corp., but now our lowest price cannot be less than \$3.70 irrespective of the fact that the Numont Corp. have not and will not change their \$3.45 figure.

"Of course, we can prove to the trade that our \$3.70 price is necessary but they are not interested in our troubles and while we will no doubt hold some business, the bulk of it is bound to go to A.O. at \$3.45—less 10 per cent to the big boys. If we go out with a \$3.70 price and a new temple to justify it our chances are much better." [On August 12, 1940, Numont Ful-Vue Corporation increased the minimum price from \$3.45 to \$3.55.]

Writing again on September 7, Kahn Optical stated:

"They did give some consideration—slight though it was—to American manufacturers, who exported to Canada as far as Numonts are concerned, but their Top-Rim prices, for instance, are such that it is absolutely out of the question to import American Top-Rim items..."

Generally the margin between stock and prescription prices of frames and mountings permitted the independent Canadian wholesalers to sell profitably on a prescription basis to retailers but not on sales in quantity lots. On September 15, 1939, C. A. Epp of Imperial Optical told his Vancouver branch:

"... the sale of lots of 25 Numonts, and lots of 50 frames, etc. should be discouraged as much as possible. These quantity prices did not show us a normal profit even without the addition of the U.S. exchange, and . . . with the addition of the exchange it cuts our profit down to very, very little."

The following comparison of prices as of January, 1940, graphically indicates the situation:

	Manufacturers' Prices		N.F.V.C. Wholesale Prices	
	U.S. Mfrs' price laid down in Canada	Consol. price to wholesalers	Lowest stock price	Prescription price
Standard Numont Gold-Filled Mounting	\$2.82	\$2.50	\$2.93	\$4.00
Standard Gold-Filled Ful-Vue Frame	2.40	2.07	2.30	3.45

If competitive conditions had existed in the United States market there would be little reason to refer to the fact that Canadian-made goods were priced below goods imported from the United States. United States manufacturers, whose prices for these vital patented products were controlled by the manufacturing licences issued by American Optical, could not reduce their prices for these products below the minimum prices set for Canada. This made it possible for the whole Canadian price structure for these products to be maintained on an artificial basis bearing no necessary relation to conditions that might have existed under free competition.

The position of independent Canadian wholesalers was relatively prosperous during the war period despite the handicap described. This state of affairs was ascribed to a number of factors, including a wartime prosperity which nearly tripled total wholesale sales in Canada, the development of professionalism in optometry which tended to induce optometrists to purchase more goods on a prescription rather than on a stock basis, and increased retail sales which relieved retailers of much of their concern about their buying prices. Under these conditions independent wholesalers could usually dispose of imported goods without much difficulty even at prices slightly above those of Consolidated Optical.

Almost all frames and mountings sold in Canada are made either by Consolidated Optical or by United States manufacturers. Consolidated manufactures most of the frames and mountings which it sells at Nicolet, P.Q., although it imports some spectacle parts, finished or partly finished, from the American Optical plant at Southbridge, Mass. It is estimated that in 1939 Consolidated made over 40 per cent in dollar value of all frames and mountings sold in Canada. In 1943 this percentage had increased to about 60 per cent. It was somewhat lower in 1946, approximately 55 per cent, owing to the increased sale of zylonite frames already mentioned. Although the restrictive arrangements were not the sole factor bringing about this increase, they naturally would assist in accomplishing this result.

2. General Effect on Small and Medium-sized Wholesalers

Other aspects of the restrictive arrangements tended to discriminate against the independent wholesalers. These aspects include the following:

(1) The uniformity of lens and frame prices, one of the effects of which was to deprive some wholesalers of the advantage they had had in selling at prices below those of Consolidated Optical. Notable in this category were Commercial Optical, Central Optical, Monarch Optical, and to a lesser degree, Canadian Optical Service, Champlain Optical, National Optical and others. All sales below the minimum prices fixed were not eliminated, but such sales were greatly reduced and latterly were reduced to almost nothing. Commercial Optical and Central Optical in particular had built up their business on a low price basis. Among the smaller wholesalers it will be recalled that these two companies provided the principal opposition to the Numont Ful-Vue plan when it was first introduced in 1939 and were the only two against whom Numont Ful-Vue Corporation found it necessary to take legal action.

(2) Reference has been made to the objections of most wholesalers to the feature of the Numont Ful-Vue plan permitting wholesalers to give year-end discounts of 5 per cent or 10 per cent to retailers whose annual purchases were more than \$5,000 or \$10,000 worth of goods respectively.

Rickwood, Canadian manager of Numont Ful-Vue Corporation, recognized the possible strength of the objections. Writing his immediate superior, Marsters of American Optical, as recently as March 4, 1946, Rickwood stated:

"... American is building up bad will among the wholesalers by what they, the wholesalers, believe is an initial advantage on American [Optical] parts. As I recommended before the advantages it brings is more than offset by the bad will it is creating. You see the 5 per cent and 10 per cent puts Consol in a favoured position and my own reaction is that trying to protect a market this way weakens your entire set-up."

An example of how this worked out is given in a letter of November 1, 1939, to his head office by Lett, then manager of the Vancouver branch of Consolidated Optical and now general manager of the company, respecting one of the principal Vancouver retailers:

"We think, without a doubt, that . . . [the Vancouver retailer] will go Ten Thousand Dollars with us this year; in fact by my hurried estimate he has about Two Thousand Dollars to go in November and December to reach this mark. We heard yesterday, that he had told . . . his man whom Maurice calls on, that he had decided to buy all Canadian goods. Of course, we know the reason for this, still it's nice to be sitting in a favourable position with a retailing establishment of that size"

Reid of the Toronto office replied on November 6:

"I held open that change in Celex lenses until you would get the order from... [the Vancouver retailer] ...as it would be a chance to do a favor for him... Will watch for the order from... [him] before we agree with the other jobbers regarding a new price on Celex lenses. If you feel like telling... [him] quietly that we do try to protect his interests, you can use your judgment about that."

(3) An important factor in both the wholesale and retail trade since 1942, and especially since 1944, has been the so-called "American Plan" propagated by American Optical and Consolidated Optical. By circulars, pamphlets, advertisements and lectures, they have assiduously spread the idea that if optometrists are to progress they must increasingly "professionalize". They have sought to emphasize to optometrists that they do not "sell glasses" but rather supply professional services. The "Plan" deemed it "unethical" for a manufacturer or a wholesaler to advertise, especially to the public, specific brands of spectacle goods. These ideas, whatever their intrinsic merits from other points of view, obviously prejudice the smaller manufacturer or wholesaler, who must depend upon price competition and advertising to maintain or expand his position. Further aspects of the "American Plan" as it affects the retail trade are referred to in Section 5 of chapter XI.

3. Reduction of Price Competition at Manufacturing and Wholesale Levels

The greater part of this report has been devoted, directly or indirectly, to determining to what extent and in what way arrangements among manufacturers and wholesalers have reduced price competition in Canada in the sale of optical goods. Detailed recapitulation is unnecessary at this point. It is sufficient to note in general terms the relevancy of this basic question to the subject matter of this chapter. Viewing the arrangements as a whole, there can be no doubt that they were designed to have and actually have had the effect of substantially reducing price competition.

More specifically the following inter-related aspects may be recalled:

(1) The dominant price leadership position, with reference to all types of optical goods, of American Optical and its Canadian subsidiary, Consolidated Optical.

(2) The establishment of price levels below which manufacturers and wholesalers were not permitted to sell frames and mountings controlled under the Numont Ful-Vue plan.

(3) Very substantial lessening, by the Numont Ful-Vue plan, of price competition among wholesalers affecting prescription prices for lenses used with frames and mountings covered by the plan.

(4) Substantial reduction, effected by the lens arrangements described in chapter IX, of price competition in the sale of lenses by both manufacturers and wholesalers. Special emphasis must be placed on the agreements which had the effect of substantially removing from the Canadian market lenses sold at the lower Celex prices.

4. Wholesalers' Acceptance of Restrictive Arrangements

All wholesalers, including Imperial Optical and Bausch & Lomb but not including Consolidated Optical, contended that they had no alternative but to enter into the arrangements in which they were involved. Respecting the Numont Ful-Vue plan, they stated they assumed the validity of the patents and the right of American Optical and Numont Ful-Vue Corporation to issue the licences, including conditions as to lenses. They had to sign licences to obtain goods covered by the licences, goods which were essential to the operation of their business. They claimed therefore that they should not be blamed for participation in the plan.

Many wholesalers claimed that, with reference to other arrangements, they generally followed the prices of Consolidated Optical without specific agreement because of Consolidated's leadership in the industry and because their past experience and that of others had shown that Consolidated Optical, the manufacturer from whom they obtained an important part of their supplies, might otherwise discontinue supplying them.

These claims are undoubtedly exaggerated. One cannot readily conclude that companies of the financial strength of Imperial Optical and Bausch & Lomb were unable to maintain their independence even when faced with pressure from the admittedly more powerful American Optical Company. With reference to the lens arrangements, in which Bausch & Lomb was only slightly involved but in which Imperial Optical was a prime mover, it is difficult to see why Imperial and other wholesalers, in the period 1944 to 1946 when the arrangements were finally completed, were more susceptible to control by American Optical than they were in earlier years when the lens arrangements were not effective. There is no doubt, of course, that all wholesalers, with the probable exception of Bausch & Lomb, entered the Numont Ful-Vue plan reluctantly, disliking many features of it which to their mind gave Consolidated Optical a preferred position in the Canadian market. Even Bausch & Lomb strongly disliked the 5 and 10 per cent year-end discounts.

Both Bausch & Lomb and Imperial knew that serious doubts existed as to the validity of the basic Ful-Vue patents. Such considerations would not have been without relevance if they had chosen to challenge the widespread trade control which could not have been effective without patent control. Financial considerations no doubt had great weight in deterring them from such a course, as is apparent from a letter which C. A. Epp of Imperial Optical wrote to the company's Vancouver branch on February 17, 1938:

"From the standpoint of the various manufacturers selling Ful-Vue and HiBo frames they make more profit than in selling regular frames. Therefore, they have no desire to break down the patents. Further it would require a lot of money to fight a Court case if the patent were challenged and none of the manufacturers to whom we have spoken have any desire to do this. It would be both expensive and would reduce profit."

In the end, however, all wholesalers subscribed to the plan. Imperial Optical received special concessions, including a manufacturing licence which made the scheme more acceptable to it. Bausch & Lomb's strong position in the United States undoubtedly made it less vulnerable to any extension of American Optical's domination through the plan. Smaller wholesalers were obviously in a very much weaker position. Even they, however, were not wholly impotent. The special treatment of one of them, Commercial Optical, when in 1941 it gave notice of withdrawal from the plan, is in this regard significant.

Documentary and oral evidence shows that all large and medium-sized wholesalers, with the possible exception of Commercial Optical, were in agreement in 1946 and 1947 that the arrangements had on balance benefited them by substantially reducing price competition. For many years earlier most of them had actively assisted in enforcement of the Numont Ful-Vue plan by complaining about violations on the part of others. In addition it is clear that the lens arrangements, in the later years, were actively supported by all wholesalers, including those in the province of Quebec.

Whatever the possibility of independent action on the part of wholesalers, the basic fact remains that American Optical was in a dominant position in the industry and controlled the use of the basic frame patents. The Canadian market, especially for frames, is only a part of the North American market. In that wider market for frames Bausch & Lomb (U.S.) ranks second only to American Optical, but the Canadian manufacturers and wholesalers, including Imperial, play only a very small part. Recognizing this fact, and realizing the time, expense and uncertainty of patent actions which might have been involved in any attempt to resist, one can well appreciate that the "independent" Canadian wholesalers felt they had no option but to accept the proposals of American Optical rather than risk the quite possibly fatal consequences of not doing so. It does not follow, however, that in such circumstances they are relieved of responsibility for their part in becoming parties to the restrictive arrangements and furthering many aspects of them. A larger share of responsibility must be borne by Bausch & Lomb because of the strength of its position in the United States and Canada and its active part in encouraging the adoption of the Numont Ful-Vue plan, and by Imperial Optical because of its position as the largest Canadian wholesaler and because of its active role in devising many of the lens arrangements and in inducing their acceptance by other wholesalers.

XI. RETAILING UNDER THE RESTRICTIVE ARRANGEMENTS

1. Attitude of Retailers

There is no question that certain features of the Numont Ful-Vue plan made a strong appeal to the retail trade generally when it was introduced in 1939. Many optometrists and opticians had been made painfully aware of the competitive conditions in the thirties which made it difficult for them to get the prices they wanted for their merchandise and service. Attempts of manufacturers and wholesalers to have prices maintained at each stage of distribution had met with only limited success before 1939.

While the object of the American Optical Company in promoting the Numont Ful-Vue plan was naturally to further its own interests, Canadian wholesale and retail distributors had much to gain from it. Most of them realized that under it the pressure of price competition would be much reduced. Certainly Numont Ful-Vue Corporation and Consolidated Optical did their utmost to stress this advantage, as has already been noted in chapter III of this report. This is reflected in letters exchanged within the organization, such as the letter from C. J. Atkinson of Consolidated, written on May 19, 1939, to the company's Edmonton branch:

"We cannot understand any retailer objecting to a setup that is really for his own benefit. As you know, conditions are not what they should be, and here is an opportunity to protect the retailer, to give him something which he has been trying to get for some time."

Another letter, written on June 10, 1939, to R. F. Reid of Consolidated by the Moneton branch, emphasized the advantage to the optical business as a whole:

"Well, the new program is in effect. Nothing lower in quality than Super Centex on all patented lines and what a great relief and a wonderful change and it is going to work out to the advantage of the optical business as a whole. Incidentally, it is going to help our prescription figures considerably. They certainly can stand the help."

Later, on February 5, 1940, Consolidated's London branch reported to Reid:

"The general feeling seemed to be that the Numont schedule presented one instance where the smaller account could successfully compete with the optometrists in the larger centres . . . most of them showed considerable surprise that they had been experiencing so little difficulty in getting the retail prices stipulated."

In Western Canada, in 1942, the attitude of the average optometrist was reported to be highly favourable. At least this is the effect of a report which G. Rickwood of Numont Ful-Vue Corporation made to A. K. Marsters of Southbridge, Mass., on July 10, 1942, following a survey of Western Canada.

"He [the average Western optometrist] likes the Numont plan for two reasons:

- (a) Because it has increased his unit sale, therefore his total income.
- (b) It has helped to sponsor a professional feeling . . .

He has no complaints against our other licensees, believing in general that Ful-Vue prices are kept. He feels this way since he cannot imagine anyone silly enough to try and make a living without a Full-Vue licence . . . I would say that he is not entirely sold on corrected lenses, since many have remarked that they can literally see no difference."

Resentment against the plan was most marked in the earlier years, and particularly in the province of Quebec. In the Maritime Provinces, early opposition was apparent, as indicated in a letter from the Saint John branch of Imperial Optical to Percy Hermant, written on October 7, 1939:

"The trade in many places are opposed to the Numont Corporation dictating as to what prices they should charge as they feel that they are going a step too far, and in the smaller communities they cannot get as high a price as in the larger centres and feel that the prices should be modified."

In the province of Quebec the retailers were not too co-operative. This is reflected in discussions when the plan was introduced and in much of the correspondence, of which the following letter of December 16, 1939, from R. F. Reid to W. G. Coffin, Consolidated manager in Montreal, is typical:

"It is hard to understand why these fellows in Montreal seem so anxious to break anything down, get things as low as can be. They don't want to hold up quality standards or hold up prices. They know they have had struggling business in the optical business all these years and when there is a chance to straighten it up, they do everything in their power to find ways and means to pull it down."

But by 1943, to judge from a letter from Coffin of Montreal to C. J. Atkinson of Consolidated's head office, opinion of a considerable part of the trade in Quebec was changing. Coffin's letter was written on February 6, 1943:

"... I personally think and I believe the majority of my customers are of the same opinion as myself that if it was not for the Numont Ful-Vue Corporation the optical trade in the province of Quebec would still be down in the gutter."

It was only natural that the attitude of retailers should change. All of them had been obliged to comply and most of them had found benefits in so doing, since they were freed to a considerable extent from the necessity of meeting the competition of lower prices. The optical trade was benefited for the time being, but, it would appear, by establishing conditions under which consumers lost much of the protection afforded them by active price competition. It is to the advantage of the trade to push higher-priced lines, even though most consumers might prefer less expensive lines which would be at the same time serviceable and attractive. The average consumer, purchasing glasses on the basis of a prescription which he may never see and which he could not interpret, is in a difficult position to make any comparison as to price. He knows little or nothing as to the relative prices of either frames or lenses and his choice is largely limited to the goods most generally featured. In the period under review, these goods, to a preponderant degree, have been those which have been controlled as to price and design by the arrangements herein described.

The mixed feelings of retailers characteristic of the early stages are understandable. On the one hand there was resentment against the curbing of their independence, and on the other hand there was the prospect, which many welcomed, of the establishment of minimum prices below which none of their competitors was permitted to sell. Equally understandable was the general, though not complete, acceptance in the end of a scheme which gave promise of improved financial returns.

2. Minimum Resale Price Maintenance

The Numont Ful-Vue plan did not cause actual increases in prices for all retailers. For some it did have this effect, but in all cases it was designed to prevent any reductions in price below levels determined by American Optical. Before establishing minimum prices, American Optical ascertained the prevailing prices of larger optometrists in cities like Toronto and Montreal and used them as the basis of arriving at minimum prices for the whole of Canada. Many retailers, however, including some opticians with large volume, had previously charged lower prices. Many optometrists in the province of Quebec had charged lower prices, as had many optometrists in smaller towns in other provinces. Many who had been accustomed to give special discounts to certain classes of consumer or, in a truly professional spirit, to deserving cases, were no longer permitted to give such discounts on goods covered by the licences, except to certain classes specifically named by licence schedules. What had previously been an average price became the minimum price without regard to differences that existed previously between different localities and types of retailer.

The programme of controlled minimum resale prices continued from 1939 until early in 1947, shortly after the first hearings in the present investigation. By that time the established minimum basis had served its purpose: retailers generally had become accustomed to the higher level of prices. Even after the restriction was removed, few were inclined to charge below the minimum, and a great many were able to continue with prices considerably above the minimum.

The basic case against policies of resale price maintenance generally is that price competition amongst dealers is thereby eliminated in the sale of the goods affected. In lines of business in which goods are supplied by many manufacturers, only some of whom prevent sales below fixed minimum resale prices, consumers have some measure of protection. Consumers in such cases can turn to the products of other manufacturers who impose no such restrictions. Even this alternative, the availability of goods not so controlled in price, can be a most inadequate public safeguard. It is especially inadequate when a considerable part of the goods in strongest public demand (a demand often stimulated by the suppliers) cannot be sold below fixed minimum resale prices.

In the case of optical goods, one manufacturer established floor prices which applied to over 90 per cent of the goods sold by the retail trade, even though that one manufacturer produced only 50 per cent in dollar value of all such goods.

At the end of chapter V and in the next section of this chapter, examples are given of the margins secured by retailers. In considering these margins one should have regard to the various types of service performed by the different classes of retailers. Optometrists, opticians and others in the trade have emphasized strongly that direct comparisons with profit margins on ordinary lines of retail goods are most unfair. Quite apart from the fact that many lenses cost more than those included in the examples for which minimum wholesale prices are given, such comparisons, they point out, fail to take into account the professional skill and technical ability required in supplying a pair of eye-glasses. Much more is involved in supplying a pair of glasses than in selling ordinary goods handed over by a clerk from the stock of a retail store. Although the consumer receives an article of merchandise, namely, the spectacles, they are goods made up to fit his particular visual needs. Although in the great majority of cases standard parts and lenses are used, they must be assembled in a special combination. In accomplishing this result a series of services must be performed.

The optician, who is not permitted by law to examine eyes and prescribe glasses, receives from the consumer a prescription prepared by a medical doctor. He must know how to interpret it and will fill it or have it filled. When the prescription is filled he will check the glasses to make sure they comply with the prescription. He will adjust the frame to ensure that it fits comfortably and holds the lenses in proper position before the eyes. Ordinarily he will also supply, as part of the services covered by his charge, incidental repairs and adjustments which may subsequently be required.

The optometrist performs all the services performed by an optician and also performs a number of services which, in the case of a person served by an optician, are usually performed by a medical doctor. The optometrist will first examine the general appearance of the eyes and, if he observes diseased conditions requiring medical or surgical treatment, which by law only a medical doctor can provide, he will refer the patient to a doctor. If no such conditions are apparent, he will make a number of tests to determine the degree and kind of visual error. He will then write down the prescription specifying the kind and strength of lenses required to correct the error and, usually, the dimensions of frame or mounting required. After the prescription has been filled he may "re-evaluate", i.e. check the glasses with the eyes to make sure that the refraction was accurate.

Under the Numont Ful-Vue retail licences, the same minimum prices were established for both optometrists and opticians.

While these minimum margins under the Numont Ful-Vue plan appear to have been high, the total net income of most individual retailers in 1941 was not great largely because of the small volume of their business.

Some idea of the total sales of optometrists and opticians and their net incomes in 1941 and 1946 is given by the figures in the following tables. This information was obtained in the summer of 1947 by means of questionnaires addressed to all those appearing in the latest list of Numont Ful-Vue retail licensees and to all other registered optometrists. Returns received from approximately two-thirds of those listed as licensees, which are the basis of the following tables may be taken as an adequate representation of sales and income of those engaged in the retail selling of optical goods in Canada, including optometrists, opticians and miscellaneous classes of retail dispenser. The first two tables are based on the returns received from independent optometrists (not including optometry departments of merchandising establishments) and from full-time opticians. It should be borne in mind that there are relatively few full-time opticians and that consequently the number of returns received for this group was small. A few large establishments thus have a substantial influence on the averages shown, particularly in the range with gross receipts of \$20,000 and over and with net income of \$5,000 and over. The proportions and averages in the lower ranges for them would not be so affected.

TABLE 4—CLASSIFICATION OF OPTOMETRISTS AND OPTICIANS ACCORDING TO GROSS RECEIPTS, 1941 AND 1946

Gross Receipts	OPTOMETRISTS				OPTICIANS			
	1941		1946		1941		1946	
	Number in Range as per cent of Total	Average Gross Receipts of those in Range	Number in Range as per cent of Total	Average Gross Receipts of those in Range	Number in Range as per cent of Total	Average Gross Receipts of those in Range	Number in Range as per cent of Total	Average Gross Receipts of those in Range
	%	\$	%	\$	%	\$	%	\$
Less than \$5,000...	27	3,431	16	3,220	5	3,000	4	3,627
\$5,000 to \$9,999....	37	7,109	30	7,146	15	7,808	8	7,374
\$10,000 to \$19,999..	27	13,462	37	13,916	30	14,917	23	14,671
\$20,000 and over...	9	29,909	17	28,352	50	41,254	65	57,296
All groups.....	100	9,761	100	12,587	100	26,423	100	41,707

TABLE 5—CLASSIFICATION OF OPTOMETRISTS AND OPTICIANS ACCORDING TO NET INCOME 1941 AND 1946

Net Income	Number in Each Range as Percentage of Total			
	Optometrists		Opticians	
	1941	1946	1941	1946
Less than \$1,500.....	21%	7%	15%	3%
\$1,500 to \$1,999.....	15%	9%	4%
\$2,000 to \$2,999.....	23%	21%	15%	11%
\$3,000 to \$4,999.....	27%	33%	25%	18%
\$5,000 and over.....	14%	30%	45%	64%
Average net income all groups.....	\$3,082	\$4,295	\$5,998	\$8,880

One purpose in introducing these tables in this context is to draw attention to the small volume of business of most retailers, particularly that of optometrists. Opticians are very much fewer in number, and generally carry on business in larger cities where the majority have establishments employing several assistants. Few opticians do a business of less than \$10,000 a year. Nearly half the optometrists, even in the more prosperous year of 1946, reported gross receipts of less than \$10,000. The average receipts of this group of optometrists amounted to \$5,785 for the year, or an average per day of just less than \$19.00. From these figures it is apparent that the number of customers served by a very substantial number of retailers in the optical trade is exceedingly small. Resale price maintenance permits and encourages such a condition by guaranteeing high margins on individual transactions. Larger volume should reduce costs, but, under such measures of control, if costs are reduced because of increased volume or other factors, prices to the consumer cannot be reduced below the established minimum.

It has been stated in evidence that the fixing of minimum resale prices has been of only slight importance in the trade in recent years, and that the tendency has been for many retailers to charge prices well above the minimum. This is confirmed by reports received from both optometrists and opticians. How far they have exceeded the minimum is indicated in the next section of this chapter. Retailers were prevented from quoting below the minimum but there was nothing in the arrangement to prevent them from charging higher prices.

3. Retail Prices in 1947

A survey of retail prices in 1947 was made through the questionnaires referred to in the preceding section of this chapter. The cancellation of all retail licences in February 1947 (referred to in chapter VIII of this report) had removed the requirement that fixed minimum retail prices must be observed. Prior to February, however, it is apparent that a high percentage of goods had been sold above the minimum prices and that very few sales were made below that level. The fixing of minimum prices, strong consumer demand during the war, elimination of cheaper lenses at the wholesale level, and other increases in cost after 1939, were doubtless the principal forces bringing about retail price increases.

Prices of three types of completed spectacles are given in the following tables as typical examples of prices in mid-1947. Frames of the classes shown in these examples represent approximately two-thirds of all frames sold in that period. Lenses shown in the examples are "non-corrected" lenses, the commonest class of single vision lens used; the prices and types shown are the lowest priced "non-corrected" lenses permitted under the Numont Ful-Vue plan. Frames of these types when fitted with lenses of higher powers, with trade-marked single-vision lenses or with bifocal lenses, cost the retailer more and ordinarily command higher retail prices.

The first table shows the *average* prices at which these eyeglasses were supplied by different types of retailer. It includes the retailer's cost of a pair of glasses completely finished when he buys one at a time to fill individual prescriptions. The cost of frames would be substantially lower for those retailers whose volume is sufficient to enable them to purchase on a quantity basis, as would also the cost of lenses, but the saving on lenses would be largely offset by the cost of edging and other finishing. The table also includes a column

showing the Numont Ful-Vue minimum selling prices which were in effect up to February 5, 1947:

TABLE 6—AVERAGE RETAIL PRICES AND WHOLESALE COSTS OF COMPLETE SPECTACLES—MAY-JULY, 1947

	Cost to Retailer (Prescription basis) ¹	Numont Ful-Vue Minimum Retail Price effective to Feb. 5, 1947	Full-time Opticians — Average Price	Independent Optomet- rists — Average Price	Optomet- rical Depts. of Merchand- ising Estab- lishments — Average Price
	\$	\$	\$	\$	\$
Numont pink gold-filled mounting with lenses ²	5.80	15.00	14.78	16.86	16.60
Ful-Vue pink gold-filled frame with lenses ²	5.05	12.50	12.26	14.73	13.76
Ful-Vue— Zylonite frame ³ with lenses ²	4.20	10.00	10.67	13.20	12.30

One striking thing shown by the above table is that, even in June 1947, the *average* prices of optometrists were above the Numont Ful-Vue minimum prices, and those of opticians approximated the minimum prices. The difference in the charges made by optometrists and opticians reflects to some extent the differences in the respective services performed by them, referred to in the immediately preceding section.

It should be emphasized that these are *average* figures. The next table shows the very wide range in prices from which these averages were derived.

¹ Not including the cost of about 25 cents for spectacle cases, which are often supplied by the retailer without separate charge.

² Retailers were asked to report "usual or average" amounts received for each item. Some, however, may have based their returns on spectacles with "corrected" lenses, which would advance their costs in the case of frames by thirty-five cents or by forty cents in the case of mountings. Numont Ful-Vue minimum prices for spectacles with "corrected" lenses were \$1.00 above prices for those with "non-corrected". It is estimated, however, that not more than one-fifth of single vision lenses sold during the period were of the "corrected" type.

³ It is probable that the particular type of zylonite frame for which prices were reported varied to some extent. The great majority of frames used, however, fell within a comparatively narrow range of wholesale prices, varying at prescription rates from forty cents below the cost quoted to ten cents above it.

TABLE 7—CLASSIFICATION OF RETAILERS ACCORDING TO AMOUNTS RECEIVED FOR
COMPLETE SPECTACLES—ALL PROVINCES¹
MAY-JULY, 1947

Number in each Range as Percentage of Total

	Numont pink gold-filled mounting with lenses ²	Ful-Vue pink gold-filled frame with lenses ²	Ful-Vue zylonite frame with lenses ²
INDEPENDENT OPTOMETRISTS—			
Over \$19.75	13%	5%	4%
\$18.76 to \$19.75	5%	1%	1%
\$17.76 to \$18.75	17%	6%	3%
\$16.76 to \$17.75	19%	7%	3%
\$15.76 to \$16.75	19%	13%	5%
\$14.76 to \$15.75	17%	17%	10%
\$13.76 to \$14.75	5%	18%	10%
\$12.76 to \$13.75	1%	11%	14%
\$11.76 to \$12.75	2%	18%	23%
\$10.76 to \$11.75	1%	2%	13%
\$9.76 to \$10.75	1%	1%	11%
\$9.75 and under	—	1%	3%
	100	100	100
Minimum under Numont Ful-Vue licence	\$15.00	\$12.50	\$10.00
FULL-TIME OPTICIANS—			
Over \$19.75	—	—	—
\$18.76 to \$19.75	—	—	—
\$17.76 to \$18.75	3%	—	—
\$16.76 to \$17.75	3%	—	—
\$15.76 to \$16.75	21%	—	—
\$14.76 to \$15.75	45%	—	—
\$13.76 to \$14.75	10%	11%	4%
\$12.76 to \$13.75	4%	21%	—
\$11.76 to \$12.75	7%	40%	18%
\$10.76 to \$11.75	7%	21%	22%
\$9.76 to \$10.75	—	7%	41%
\$9.75 and under	—	—	15%
	100	100	100
Minimum under Numont Ful-Vue licence	\$15.00	\$12.50	\$10.00
Wholesale prescription prices to Retailer	\$5.80	\$5.05	\$4.20

¹ Amounts reported cover all services in each case; optometrists services include examining, refracting and prescribing, services which are not performed by opticians.

² See footnotes to Table 6.

TABLE 8—CLASSIFICATION OF INDEPENDENT OPTOMETRISTS ACCORDING TO AMOUNTS RECEIVED FOR COMPLETE SPECTACLES, BY REGIONS¹
MAY-JULY, 1947

Number in each Range as Percentage of Total

	Maritime Provinces	Quebec	Ontario	Prairie ³ Provinces	British Columbia	Dominion
NUMONT PINK GOLD-FILLED MOUNTING WITH LENSES²						
Minimum under Numont Ful-Vue licence \$15.00.						
Over \$19.75.....	46%	5%	6%	24%	34%	13%
\$18.76 to \$19.75.....	12%	1%	4%	7%	15%	5%
\$17.76 to \$18.75.....	6%	20%	12%	29%	29%	17%
\$16.76 to \$17.75.....	12%	11%	25%	17%	17%	19%
\$15.76 to \$16.75.....	6%	23%	24%	10%	5%	19%
\$14.76 to \$15.75.....	12%	25%	20%	9%	—	17%
\$13.76 to \$14.75.....	6%	9%	4%	4%	—	5%
\$12.76 to \$13.75.....	—	1%	1%	—	—	1%
\$11.76 to \$12.75.....	—	3%	2%	—	—	2%
\$10.76 to \$11.75.....	—	—	1%	—	—	1%
\$9.76 to \$10.75.....	—	2%	1%	—	—	1%
\$9.76 and under.....	—	—	—	—	—	—
Total.....	100%	100%	100%	100%	100%	100%
Average Price.....	\$18.86	\$16.08	\$16.40	\$17.93	\$18.90	\$16.86
FUL-VUE PINK GOLD-FILLED FRAME WITH LENSES²						
Minimum under Numont Ful-Vue licence \$12.50.						
Over \$19.75.....	31%	2%	2%	5%	7%	5%
\$18.76 to \$19.75.....	3%	—	1%	—	3%	1%
\$17.76 to \$18.75.....	11%	4%	2%	13%	20%	6%
\$16.76 to \$17.75.....	3%	3%	6%	13%	22%	7%
\$15.76 to \$16.75.....	9%	7%	15%	19%	8%	13%
\$14.76 to \$15.75.....	11%	16%	17%	19%	20%	17%
\$13.76 to \$14.75.....	11%	16%	23%	16%	5%	18%
\$12.76 to \$13.75.....	3%	14%	12%	8%	8%	11%
\$11.76 to \$12.75.....	9%	31%	17%	7%	7%	18%
\$10.76 to \$11.75.....	6%	4%	3%	—	—	2%
\$9.76 to \$10.75.....	3%	1%	2%	—	—	1%
\$9.76 and under.....	—	2%	—	—	—	1%
Total.....	100%	100%	100%	100%	100%	100%
Average Price.....	\$16.70	\$13.79	\$14.42	\$15.67	\$16.45	\$14.73
FUL-VUE ZYLONITE FRAME WITH LENSES²						
Minimum under Numont Ful-Vue licence \$10.00.						
Over \$19.75.....	25%	—	2%	3%	7%	4%
\$18.76 to \$19.75.....	3%	—	—	2%	—	1%
\$17.76 to \$18.75.....	15%	2%	2%	—	2%	3%
\$16.76 to \$17.75.....	3%	2%	3%	7%	5%	3%
\$15.76 to \$16.75.....	9%	3%	2%	8%	20%	5%
\$14.76 to \$15.75.....	3%	2%	10%	18%	27%	10%
\$13.76 to \$14.75.....	6%	6%	12%	18%	5%	10%
\$12.76 to \$13.75.....	12%	15%	13%	18%	7%	14%
\$11.76 to \$12.75.....	18%	32%	23%	12%	17%	23%
\$10.76 to \$11.75.....	—	16%	17%	7%	5%	13%
\$9.76 to \$10.75.....	6%	16%	13%	5%	5%	11%
\$9.76 and under.....	—	6%	3%	2%	—	3%
Total.....	100%	100%	100%	100%	100%	100%
Average Price.....	\$16.19	\$11.93	\$12.79	\$14.14	\$15.18	\$13.20

¹ Amounts reported cover all services.

² See footnotes to Table 6.

³ Only 5 of 30 Saskatchewan optometrists reporting supplied price data. See comment in paragraphs following this table.

Variations in retail prices among provinces tend to reflect competitive conditions existing prior to the establishment of the restrictive arrangements disclosed in this report. Prices are proportionately higher in those provinces where there are few independent wholesalers and where there have been few aggressive retailers. In British Columbia, where retail prices are above the Dominion average, the removal of lower-priced lenses was first accomplished by arrangements between the two principal wholesalers. On the other hand, in Quebec, where retail prices have not advanced as far as in other provinces, there was initial opposition to the Numont Ful-Vue plan and competition among wholesalers was carried on more aggressively until a later period.

Optometrists in Saskatchewan provided very little information which could be included in these tables. In all but five cases answers to the questionnaire were made on a mimeographed form prepared, and in part filled in, by the Saskatchewan Optometric Association. Gross receipts and net profit before income tax were inserted by the optometrist but gross receipts were described as "my total income from professional services rendered", and net profit as "my balance of income over expenditure". These returns included no particulars in answer to questions which asked for the usual or average amounts received for all services (including materials) in supplying (1) a pair of low power white spherical lenses, and (2) certain types of frames or mountings with lenses. Instead of reporting amounts received, as was done by optometrists generally in other parts of Canada, the Saskatchewan optometrists answered the question regarding lenses by the following paragraph in their mimeographed return:

"As a professional optometrist, I do not 'supply' any materials. Ophthalmic materials are 'supplied' to me by the optical laboratory and when the need arises, I use or consume them. Under Item No. 30 of the Education Tax Regulations, Government of Saskatchewan, the optometrist is considered as the consumer of ophthalmic materials and as such does not collect tax from his patients when materials are used. Education tax is paid by the optometrist to the laboratory. Under the arrangement existing between the Saskatchewan Optometric Association and the Medical Services Division of the Saskatchewan Government, my services are used on a fee for professional services *plus* the actual laboratory cost of the materials which I consume in each case. Therefore, it would be impossible to give the figure requested because:

- (a) My fees are for professional services rendered *plus* laboratory charges and ophthalmic supplies consumed.
- (b) These fees vary greatly with various factors and conditions. For example:
 - (a) Medical Services Division cases are paid for by the Saskatchewan Government under Socialized Health Care.
 - (b) Department of Veterans Affairs cases are paid by the D.V.A.
 - (c) Canadian Pacific Railway cases are paid on a contract basis.
 - (d) Indigent and Charity cases are paid by municipal councils, the Red Cross and other organizations.
 - (e) The ability of patient to pay and the time, skill and knowledge spent on each case in other cases varies the fee over a great range."

The answer to the question regarding receipts for frames or mountings and lenses was as follows:

"These figures are impossible to determine for the same reasons given in Question No. 5. In all the categories listed here the materials are consumed by me and delivered to the patient at actual laboratory cost. Such materials are a cost of practising, the same as rent, light, taxes, insurance, etc., and are used and consumed when required."

4. Rebating

The Numont Ful-Vue plan with its system of minimum retail prices undoubtedly tended to formalize and, indeed, to stimulate, the practice of "rebating", i.e., the payment to a prescribing doctor by a wholesale or retail optician of part of the amount paid by a consumer for a pair of glasses supplied on the doctor's prescription. This problem does not involve optometrists since

they rarely fill doctors' prescriptions. Most oculists do not accept rebates, but the situation varies considerably in different parts of the country. Members of the Canadian Ophthalmological Society are pledged by their constitution not to accept rebates. Retail opticians who are members of the Guild of Prescription Opticians of America are pledged not to give rebates.

The practice of "rebating", a term which, as indicated below, is not an entirely accurate description, usually arises, though not in all such cases, where consumers take doctors' prescriptions directly to wholesale opticians to be filled. If the practice of rebating is followed, the wholesale or retail optician fills the prescription, supplies the glasses to the consumer in return for at least the minimum retail price, and "rebates" to the prescribing doctor a large part of the difference between the wholesale and retail prices. Methods of arriving at the proportion of the retail price paid to the doctor vary considerably, depending upon the particular arrangement he has made with the wholesale or retail optician. In some cases the doctor may receive only a flat sum of say \$5 per patient. More commonly he receives that part of the retail price left after the wholesale prescription price of the glasses and a "fitting fee" of \$1, \$2 or \$3 are deducted.

The payment by the consumer to the person who supplied the glasses would, of course, be in addition to whatever fee he paid the doctor. Doctors' fees for ordinary eye examination and prescription range from \$2 to \$15, depending upon regional custom, class of patient, degree of specialized training and other factors. The evidence indicates that the fees of doctors who commonly received rebates were generally lower than those who did not. Low fees by no means indicate that the doctor receives rebates nor do high fees prove that he does not.

The greatest amount of rebating was engaged in by wholesalers or by retail dispensing outlets operated by wholesalers, such as the retail outlets operated in several cities by Percy Hermant Limited under the name of Optical Prescription Company. Evidence secured from returns indicates that payments to doctors by wholesalers and their affiliates totalled at least \$500,000 in 1946. Imperial Optical Company (Percy Hermant Limited) and some of its affiliated houses made about 75 per cent of these payments and Consolidated Optical about 10 per cent. These two companies have branches throughout Canada, although by no means all their branches make rebates; they both make rebates through branches in most provinces.¹

Rebating by independent retail opticians is on a much smaller scale. An estimate based on partial returns and other evidence would suggest that rebates by this class totalled not more than \$50,000 in 1946 and that the great majority of such opticians do not pay rebates.

Most of those in the trade participating in the practice strenuously repudiate any suggestion that there is anything unethical about it. They point out that there is no reason why a doctor should not do his own dispensing and that a great many doctors, especially in small towns and rural areas, in fact do so. Such a doctor would send his own prescription to the wholesaler, receive the glasses when the prescription has been filled and hand them over to the consumer. He was required under the Numont Ful-Vue plan to charge the full retail price, to which his own fee, if any, would be added. Those giving rebates ask what difference it makes whether the doctor does his own dispensing or has it done for him by the wholesale or retail optician. They claim that the optician who rebates is merely acting as the doctor's agent in supplying the glasses to the consumer and collecting the retail price. In most cases the seller credits the doctor with the full retail price and at the same time debits him with the wholesale prescription price of the glasses and his agency charge for fitting the glasses.

¹Consolidated Optical, since completion of the investigation, has stated that it has discontinued rebating at all branches.

It has also been pointed out that in many of the localities where rebating is practised no satisfactory retail optician service is available, and the doctor accordingly, unless he wishes to do his own dispensing, may consider that he has no alternative but to employ the dispensing facilities of a wholesaler who may follow the practice of rebating. In certain instances wholesalers have made a definite attempt to attract the oculists' patronage by providing retail outlets especially to supply glasses to consumers on their prescriptions. It is also argued strongly that, assuming fixed minimum retail prices such as those established by the Numont Ful-Vue plan or a relatively rigid retail price structure such as that still continuing, rebating may permit some lowering in the overall cost of glasses to a consumer purchasing on a doctor's prescription. The Numont Ful-Vue plan, for instance, permitted no reduction of price by the retailer or wholesaler, but a doctor who accepted rebates was in a position to reduce materially the fees charged by him and thus reduce the overall cost of eye service to his patients.

Opposition to the practice of rebating is expressed by most optometrists, who do not fill doctors' prescriptions, and by the great number of opticians and oculists who do not engage in it. American Optical stated in 1942 that "There are phases of this activity of long standing that we are not in sympathy with and will discontinue as soon as we find the method." There may be fear on the part of independent retailers that wholesalers who pay rebates might undermine the price structure unfairly, since they might absorb in their general wholesale business the overhead attributable to the retail business and thus unfairly compete with the independent retailer. It is difficult, however, to avoid the conclusion that much of the opposition to rebating arises more directly from fear of competitive effects if rebating should spread and, more particularly, if those giving rebates to doctors should give them instead directly to consumers in reduced retail prices. Any tendency in this direction would be restrained, so far as wholesalers are concerned, by their desire to retain the goodwill of their optometrist customers. The fear may well have greater relevancy with regard to retail opticians. The net prices received by retail opticians who at present give rebates are, of course, very materially lower than the prices charged by other opticians and lower still than those charged by optometrists.

Numont Ful-Vue Corporation was obviously faced by an extremely serious problem in reconciling rebating with its retail licensing controls. Rebating would be *prima facie* a violation of the licence since, especially where the doctor reduced his fee accordingly, the seller of the glasses would be giving the consumer an indirect reduction in price. This problem was solved by adopting the agency theory already referred to. Under it the doctor would be the real seller of the glasses, receiving through his agent, the "rebater", the full retail price, out of which he pays the wholesale price, pays the fitting fee of his "agent" and retains the balance. There would thus be no violation of the Numont Ful-Vue licence, especially if the doctor held a retail licence. By insisting that the full retail price be collected from the consumer by the person supplying the glasses, the Numont Ful-Vue plan necessarily stimulated rebating as illustrated in the following examples.

In March, 1942, following complaints received by other opticians, Numont Ful-Vue warned a Toronto optician that he must not give a \$5 reduction in price to a customer who showed a receipt for \$5 paid to the oculist. It would, of course, have been quite satisfactory if the optician had collected the full price and had rebated \$5 to the oculist, who could then reduce his fee accordingly.

In September, 1945, the Regina manager of Consolidated Optical reported to his head office inquiries received by him from a local oculist who was seeking ways of reducing total amounts paid by his patients for eye-glasses:

"The doctor collects \$5.00 for his refraction and then the patient is sent to . . . [the optician] and is charged the regular retail price for the glasses. For instance, we will say

\$17.00, and the \$5.00 for refracting brings it to \$22.00. What the doctor would like to be able to do is to charge \$5.00 for his refraction then have . . . [the optician] deduct \$5.00 from the retail price, or have . . . [the optician] charge \$3.00 for fitting and servicing, plus the cost of material.

In order to do this the latter way we would be breaking the Numont set-up . . ."

The Toronto office replied on October 5, pointing out that this subject was "dynamite", and ruling that both practices proposed by the doctor would be contrary to the Numont Ful-Vue plan. It suggested, however, that the doctor could accomplish "legally" what he wanted to do under his first proposal, by himself charging the patient nothing for the refraction, and having the optician rebate to the doctor \$5.00 of the minimum retail price received from the patient.

Again, as recently as December, 1946, a Saskatoon wholesaler, Premier Optical, inquired whether the retail price received from the consumer could not be reduced by the amount of money he had paid to the doctor. Rickwood of Numont Ful-Vue replied that this would not be permitted under the plan. He stated that the only way in which Premier and the doctor could accomplish the result desired would be for Premier to charge the consumer the full minimum retail price and then rebate to the doctor any agreed proportion of it. The doctor could then reduce his fee by the amount of the rebate or, if he wished, charge the consumer nothing.

The significant aspect of rebating is the light it sheds on the rigidity of the price structure and the limitations placed on any direct passing on to consumers of reductions in distributive costs and margins. This rigidity was obviously greatly extended and enhanced by the Numont Ful-Vue plan and the related restrictive arrangements discussed in this report. Even when the optician's return is reduced by the payment of a rebate, the individual consumer would not benefit unless the doctor passed on part or all of the rebate. This is done by some oculists. The giving of such a rebate by the optician represents a reduction in his margin in the particular instance, but because of its secrecy it is not likely to have any effect in reducing the whole retail price structure in a way that would benefit consumers generally.

Unless the reductions in price represented by rebates are made directly available to consumers in the form of lower prices, elimination of the practice would be of no material benefit to the general public, and would in fact deprive some consumers of benefits which they now secure indirectly. Elimination of rebating is regarded by many as desirable, but of even more fundamental importance are the elimination of the artificial rigidity in the distribution system which helps to maintain it and the development of conditions under which lower costs would be more adequately reflected in lower prices.

5. The "American Plan" and Professionalism

Examination of conditions since 1939 discloses a marked development, in the succeeding years, of a philosophy which emphasizes the professional nature of every service performed by an optometrist. The practice of optometry is given a special status by provincial legislation, and only those who meet the statutory requirements may practice as optometrists. Apart from medical doctors only optometrists may perform the professional functions of examining and refracting eyes and of prescribing eyeglasses for the correction of visual error. Optometrists are not permitted to give medical or surgical treatment, but the legislation imposes on them other responsibilities and provides for professional discipline.

Closely associated with these professional activities, however, are other activities which the public generally has regarded as commercial in character. They include the buying of frames, mountings and lenses from manufacturers or wholesalers, and the supplying of them to the consumer, after the lenses have

been checked and verified as true to the prescription. There has been general public recognition that certain professional elements are involved, even though there has not always been an adequate appreciation of the knowledge and skill required in providing glasses to meet particular eye defects. Public recognition of professional status has not extended to all phases of the optometrist's services. It is difficult for the consumer not to regard as a commercial transaction his purchase of a pair of glasses even though professional services have been involved in the process of selecting and preparing them for his particular needs.

It is striking that in recent years impetus to complete professionalism in this field has come, not only from groups of optometrists, but to a marked extent from commercial interests who would also benefit from it. Since 1942 the American Optical Company has been engaged in an aggressive campaign to promote the idea that every stage of the optometrist's activities should be regarded as professional. The campaign had its origin two or three years earlier, as described in evidence by A. K. Marsters, assistant to the president of the American Optical Co. and secretary of Numont Ful-Vue Corporation. Mr. Marsters was asked by counsel if the cancellation of American licences in 1941 resulted from the American anti-trust proceedings. He said that it had not, but he went on to refer to the beginnings of the American Plan:

"Along in 1939 or 1940 one of our officers, Mr. Cozzens, [then vice-president and later president] conceived or at least felt that the whole approach to the economics of the optical industry was incorrect in so far as the public was concerned; that what they were buying was not a pair of glasses but rather the services of a professional man. And according to his thinking the materials we call the ophthalmic materials, the lenses and frames, were not consumed by the patient, but were actually consumed by the professional men in rendering their services; and further, that any charges by such professional men over and above the cost of those materials to him, plus possibly a handling charge for breakage or something like that, might be looked upon as part of his overhead, that they were charges for professional services; and with that thinking and the advance in professional status, as professional people offering eye care services to the public, it just developed in our thinking that it was improper—not improper but at least unwise—for us to continue with a program which contemplated licences as well as fair-trade act practices, which, in terms of dealing, was in commodities rather than in supplying ophthalmic materials.

Q. But why did not that same reasoning apply to the Numont Ful-Vue business in Canada?

A. Because, in our thinking, we felt that the profession in Canada was not as far advanced."

As part of its campaign, American Optical issued a pamphlet in 1942, "The American Plan for Optometrists". The pamphlet deplores what is termed the misconception of many lay people who "think of their glasses as a commodity". The issue and the way in which it should be faced are summarized in the following paragraphs:

"The public does not question the professionalism of the pathological treatment of eyes. There is no more reason why they should question the professionalism of the other elements involved in the accomplishment of eye comfort and visual efficiency except for the conduct and practices of some members within the professions, which have developed a public misconception. The public thinks of glasses as a commodity and as such promptly associates the price of glasses with the results obtained without giving credit to the professional factors which are the all-important factors.

A long and expensive campaign is necessary to change the public's misconception of the relationship of spectacles to eye comfort and visual efficiency. The public must come to know that the cost of eye comfort is not the 'price of glasses'.

Plans are completed for an educational campaign—a big campaign to the public—sponsored by the Better Vision Institute. Several manufacturers are supporting it, and all manufacturers of ophthalmic corrective materials were solicited. It is a much needed step in the big job ahead. We are donating \$130,000 this year to this Better Vision Institute Public Educational Campaign. It is appearing in national magazines. Watch for it!"

American Optical frankly admitted in its literature that in promoting this philosophy its own "position of tomorrow would be made more secure". Its active advocacy of the "American Plan", with its emphasis on high quality materials and elimination of price competition, would presumably improve its position with its customers.

In 1939 the American Optical Company, in developing the Numont Ful-Vue plan of control, treated the supplying of glasses by the optical trade as a commercial transaction. This is illustrated by the following paragraph from the retail dispenser schedules:

"The minimum resale *prices* to consumers for *merchandise* which comes under the contracts executed between the Numont Ful-Vue Corporation and its dispenser licensees are listed below. It should be noted that these *prices* do not represent the *prices* at which licensees must *sell*, nor are they necessarily recommended for the licensees' use. The *prices* listed here represent only the minimum *prices* below which a licensee may not *sell*." (Italics added)

In Canada the "American Plan" was not as aggressively pushed, at least in the earlier years, as it was in the United States. The interest of Consolidated Optical, Canadian subsidiary of American Optical, is evident, however, from the correspondence of which the following extracts are typical. On October 23, 1942, Atkinson of Consolidated, writing his Montreal office about the Plan, stated:

"... If optometry is to succeed optometrists must change their ideas regarding the prices that they charge basing them on the cost of the merchandise. Otherwise, the profit for merchandise shows too high : : : Optometrists have to be educated to use first quality material under the American plan."

Writing his Vancouver manager on July 31, 1944, Lett of Consolidated said:

"Even though a programme to implement the American Plan in Canada has not yet been put into effect, a sincere effort is being made to carry out the philosophies as expressed in the Plan."

In February, 1947, when the Numont Ful-Vue retail licences were cancelled in Canada, Numont Ful-Vue Corporation told Canadian licensees, in explanation of the cancellation:

"In the last eight years the true professionalism of examintaion, refraction, prescription, interpretation, fitting, re-evaluating and servicing has been established on a solid basis from which it cannot be dislodged."

While in Canada professionalism to this extent could hardly be said to have been actually established on a solid basis, the doctrine has met with wide acceptance, and has been propagated assiduously by Canadian optometrists themselves. The Canadian Journal of Optometry includes frequent articles on the subject. For example in the issue of November, 1946, is a letter to the members of the Canadian Association of Optometry written by its president. He protested against the practice of the optometrist who, in the majority of cases, "still hides the fee to which he is entitled for these [professional] services, in the price he charges for the eye-glasses used in correcting the errors found." He added:

"Every credit must be given to our Supply Houses, who have helped so much in stabilizing optical prices by setting minimum resale prices on their products, but on a straight merchandising basis these prices are not justified, and if we are ever to obtain the full professional status that we desire we must have the courage to bring the charges for our services into the open and to reduce the cost of the materials we supply to a reasonable level."

The Saskatchewan Optometric Association has recently gone a step further, in suggesting a schedule of fees to be charged by optometrists.¹ Under this proposed arrangement "all materials used [including lenses, frames and mountings] are consumed by the optometrists and are considered as another expense

¹ Further light is thrown on the attitude of the members of the Saskatchewan Optometric Association by their answers to questionnaires, referred to at the end of section 3 of this chapter.

the same as rent, taxes, light, insurance and so on". Such "materials" would be reckoned at "actual laboratory cost", i.e., wholesale prescription price, and this cost would be included in the one total fee.

The fee for services would cover (a) examining, refracting and prescribing; (b) verifying, fitting and re-evaluating; and (c) "subsequent servicing". In the simpler types of case, such as simple myopia, the proposed schedule recommends service fees of \$4.00 plus \$3.00 plus \$3.00 for the three different types of service provided, in addition to the actual laboratory cost of the glasses. For other types of case the service fees would total \$12.00, \$12.00 to \$14.00 or \$16.00 to \$18.00, depending on the type of eye defect, plus wholesale cost of the glasses. If such a schedule were followed it would mean that to the wholesale cost of every pair of glasses would be added at least \$10.00 for service fees. Of this amount \$3.00 would be for "subsequent servicing", a charge for the minor adjustments and repairs which have sometimes been regarded, by optometrists and opticians and by wearers of glasses, as "free after-care".

Detailed analysis of the proposed schedules is contained in an article in the Canadian Journal of Optometry for January, 1948. This article is introduced by the following paragraph:

"First and foremost *please note* that the schedule is only a *suggested* one. It is neither a minimum nor a maximum. It is variable and will have to vary with local and general economic conditions. In some respects it is higher than existing fees and in others it is lower."

The article concludes with the following appeal to the members of the Saskatchewan Optometric Association:

"As a member of the Saskatchewan Optometric Association you are asked to give careful study to the schedule and to put it into practice as readily and quickly as you are able. The whole concept of the schedule is based upon the American Plan, and in laying the stress upon the professional services rendered, is on sound moral and economic ground. Your fees must be for professional services rendered and for that alone. To practise in any other manner would be contrary to our agreement with the Education Tax authorities; it would severely prejudice our case with the income tax branch regarding Excess Profits Tax; it would be contrary to our agreement with the Department of Health for the care of O.A.P. and M.A. [Old Age Pension and Mothers' Allowance] cases, and finally, it would be contrary to your duty and responsibility to the people of this province in providing them with the best in professional visual eye care."

From agreement on such a program as is embodied in the "American Plan" it is only a short step to the establishment of agreed schedules of charges. This is not a necessary sequel, but if optometrists were to adopt jointly a common scale of charges, the results in limiting price competition would be much the same as under the Numont Ful-Vue plan of resale price maintenance. In that event, serious question would be raised as to the application of the Combines Investigation Act.

Reviewing the "American Plan" one is forced to conclude that, while its professed purpose has been to gain a wider recognition of the professional nature of the optometrist's functions, a major objective has been to remove price competition at the retail level. This would be achieved, not directly as by a formal resale price maintenance scheme, but indirectly by encouraging optometrists to adopt a philosophy in which price competition has little part. The "American Plan" thus clearly dovetailed with the other aspects of the restrictive arrangements discussed in this report and assisted indirectly in reaching the same objective of consolidating American Optical's position.

The "American Plan" is the latest of a series of developments discussed in this report designed to have the effect of minimizing competition as a factor in the determination of prices. Competition at the retail level was none too effective even before the Numont Ful-Vue plan of resale price maintenance. One effect of that plan was to establish a more substantial foundation for the maintenance of a structure of prices which embodied the wide ranges noted

in the earlier part of this chapter. Differences in service are reflected to some extent in price variations, but the Numont Ful-Vue plan and the customs of the trade have kept these price variations within such limits as not to disturb seriously the established structure of prices. Under present conditions, and with the continued influence of restrictive arrangements on the part of manufacturers and wholesalers, no formal agreement is necessary to maintain a substantially non-competitive price structure at the retail level. Competitive elements, however, are not entirely absent in this field, and there are indications that the more independent and aggressive elements, once freed from the control of the restrictive arrangements described in this report, may provide the active price competition which is so much needed.

XII. PATENTS AND RESTRAINT OF TRADE

1. Jurisdiction

The greater part of this report has consisted of an analysis of the origin, nature, purpose and effect of the licensing system established at the manufacturing, wholesale and retail levels by American Optical Company under the Numont and Ful-Vue patents listed in Appendix I. Such an analysis is necessarily based on the premise that the Commissioner of the Combines Investigation Act had authority and also indeed a duty to report on the matter as one to which the provisions of the Act applied. During the investigation, however, that premise was questioned. Before the investigation could be completed and before this report was written serious consideration had to be given and was given to the argument advanced by Consolidated Optical, Numont Ful-Vue Corporation and others that the Commissioner had no right to report on matters involving patent rights.

It was pointed out that a patent is itself a form of monopoly granted by the Crown, and that The Patent Act gives a patentee, as a reward for inventive ingenuity, the exclusive right for seventeen years of making, using and selling the patented invention. Furthermore, since The Patent Act itself provides some remedies to cure specifically named abuses of patents, it was suggested that it should be inferred that the Combines Investigation Act could have no application. To support this inference, reference was made to the specific language of subsection 4 of section 2 of the Combines Act which, after defining "merger, trust or monopoly", states that "this subsection shall not be construed or applied so as to limit or impair any right or interest derived under The Patent Act, 1935, or under any other statute of Canada." It was claimed that this inference was not affected by the enactment in 1946 of section 30 of the Combines Act giving power to the Exchequer Court to issue orders remedying certain types of undue restraint of trade arising from the use of patents; and that the section made no direct or indirect mention of the Commissioner or his investigatory powers and thus did not extend his jurisdiction. Finally, it was argued that the Combines Act, being a statute which entails penal consequences, should be strictly construed, and the jurisdiction of the Commissioner, being a statutory one, should be narrowly confined.

Although mindful of the admonition that one "should not be hungry after jurisdiction", it is impossible to accept the premise that the Combines Investigation Act has no application to any situation involving patents. "Rights conferred by patents are indeed very definite and extensive, but they do not give, any more than any other rights, an universal licence against positive prohibitions."¹ Although the Combines Act should not, even if the proviso to section 2 (4) did not exist, be interpreted and applied so as to restrict the proper exercise of rights granted by The Patent Act or by "any other statute of Canada", a multitude of considerations suggest that the Combines Act applies to all branches of trade and commerce including those affected by patents.

The Combines Investigation Act applies to *any* combination "having relation to *any* commodity which may be the subject of trade or commerce". Subject to the proviso to section 2 (4) referred to above, it also applies to *any* "merger, trust or monopoly" respecting the manufacture and sale of any such commodity. The Act is primarily a branch of the criminal law and thus *prima facie* universal in its application. It condemns restraints of trade detrimental to the public

¹Standard Sanitary Manufacturing Co. v. U.S., (1912) 226 U.S. 20 at p. 49.

brought about by any combination, or any merger, trust or monopoly. Such means may include use of contracts, of tariffs, of corporate rights, of trade marks, or of patent rights. Each of these means, when used, must be considered in the light of non-criminal legislation permitting their use for proper purposes. The existence of such legislation naturally does not exclude the application of the criminal law.

Before one could assume that Parliament intended to exclude from the scope of the general criminal law certain types of activity merely because patents or patented articles are involved, clear language accomplishing this purpose would have to be found. Such language does not appear in the legislation.

The proviso to section 2 (4) applies only to the subsection defining "merger, trust or monopoly" and does not affect the definition of combinations in restraint of trade which, like mergers, trusts or monopolies, are prohibited as "combines" when they operate or are likely to operate to the detriment or against the interest of the public. Furthermore, the proviso confers no protection where rights under The Patent Act or "any other statute" have been exceeded. The addition in 1946 of Section 30 of the Combines Act granting certain powers to the Exchequer Court confirms this approach and shows that Parliament recognized that patent rights can be used, as can any other type of civil or statutory right, "unduly" to restrain trade. The section merely added an additional remedy applicable in such cases, comparable to the remedy provided by Section 29 of the Combines Act when undue restraints have been facilitated by customs duties.

As stated in 1945 by the then president of the Patent Institute of Canada, "where the patent is used as a tool for the setting up of a combination in restraint of trade, the Combines Investigation Act or sec. 498 of the Criminal Code supplement the provisions of The Patent Act".¹

In a recent case involving civil action with reference to a "pool" of radio patents, the courts clearly assumed that the Combines Act and related legislation apply in some circumstances to restrictive arrangements respecting patents:

"... If the plaintiff's title is founded upon an agreement which amounts to a criminal conspiracy to which he is a party, and which he must establish in order to prove his title, then he cannot succeed. There is nothing in my opinion in the provisions of the *Patent Act* [1935 (Can.), c. 32] referred to on the argument that affects the application of this fundamental principle.

I am not satisfied that in no circumstances can the existence of an illegal combine be an answer to such an action. A reference to a recent decision in the Supreme Court of the United States will illustrate my point. The first two paragraphs in the headnote to *Ethyl Gasoline v. United States* (1940), 84 U.S. (Law. ed.) 559, are as follows:

'1. The regulation of prices and the suppression of competition among purchasers of the patented article are not within the scope of the monopoly conferred upon a patentee by the patent laws.

'2. A system of licences employed by the owner of patents for an improved motor fuel, whereby jobbers who do not conform to the market policies and posted gasoline prices adopted by the major oil companies may be cut off from the list of those to whom refineries licensed to manufacture such fuel may sell it, and which has been used to coerce adherence to those prices and policies, is not within the monopoly conferred by the patents and operates as an unreasonable restraint of interstate commerce in such fuel, in violation of the Federal Anti-Trust Act.'

Now, if the plaintiff in an action for infringement must, in order to make out his title, prove such a combine, and that he is a party to it, and if his alleged rights are founded upon it or 'directly result from it,' I think he would find himself in great difficulties."

—Duff, C.J., in *Philco Products Ltd. v. Thermionics Ltd.* (1940), S.C.R. 501 at pages 503-4.

"I do not mean to say that there cannot be such a thing as an unlawful combine in restraint of trade . . . by and between patent owners . . ."

—Maclean, J., in *Thermionics Ltd. v. Philco Products Ltd.* (1941), Ex. C.R. 209 at page 245.

¹G. E. Maybee, in "The Law Relating to the Abuse of Patent Rights by Combines, Trusts or Cartels" (1945), 23 C.B.R. 322 at page 329.

"... I shall assume that where A and B enter into an agreement to suppress competition in respect of articles of commerce they do not escape the provisions of S. 498 of the Criminal Code merely by reason of the fact that these articles of commerce are protected by patents."

—Duff, C.J., in *Philco Products Ltd. v. Thermionics Ltd.* (1943), S.C.R. 396 at page 406.

From the considerations presented in this section one must conclude that the Commissioner's jurisdiction to report is not limited by reason of the fact that some or all of the matters investigated arise from the purported exercise of patent rights.

2. Use of the Patents in Undue Restraint of Trade

There can be little doubt, for the reasons given in the next chapter, that restrictive arrangements such as those discussed in this report would be clearly contrary to the Combines Investigation Act if no patents were involved. Some of the principal parties in this case strongly argued that the Numont Ful-Vue plan constituted merely a proper exercise of patent rights, rights which would be improperly limited and impaired by any application of the Combines Act. They emphasized that the patentees in the present case, acting separately under their exclusive patent rights, could have kept to themselves the manufacture of the inventions and the sale of them direct to consumers at any prices they chose, subject to the abuse sections of The Patent Act. Instead, it was argued, they granted licences to others to manufacture and to sell and thus benefited the public by widening the market and making the patented products more generally available. In exercising their rights, they attached conditions to the licences respecting such matters as price and quality.

This argument presents one of the most serious issues involved in this case. The Patent Act, to encourage invention, a vital aspect of our free enterprise economy, gives a patentee the right for seventeen years to exclude others from dealing with the subject matter claimed by the patent. The Combines Investigation Act and section 498 of the Criminal Code seek to preserve competition as an essential feature of our economy and they proscribe combinations or monopolies acting in undue restraint of trade. Properly applied all three statutes are complementary. When, however, do the acts of a patentee cease to be proper exploitation of his statutory monopoly, proper attempts to obtain reward for inventive ingenuity, and when do they become acts in undue restraint of trade? The English courts give little assistance in answering this question since there has been no English legislation corresponding to the Combines Act. The Canadian courts have not had occasion to deal with the problem except in the manner indicated at the end of the last section. In the United States, where analogous although not identical bodies of both patent and anti-trust law exist, the courts have given some answers to the problem. Canadian courts have taken into consideration the reasoning of United States courts although their decisions are not, of course, of binding authority.

In the absence of statutory provisions to the contrary, a single patentee of a single invention could exercise the widest control of the patented product. He could keep the invention to himself, doing his own manufacturing and selling, or he could license others to manufacture, sell or use the invention. This position has been materially modified, directly or indirectly, by statutes such as The Patent Act and the Combines Investigation Act. For example, Section 65 and other sections of The Patent Act limit the absolute nature of the patent right.

In any event, however, this investigation is not concerned with a single patentee exercising rights under a single patent. The Numont Ful-Vue plan involved not one patent but eleven patents and three trade marks. These were grouped together and the wholesaler or retailer had to accept a licence under all

or none. Furthermore these patents were held not by one patentee but by four patentees who jointly benefited from them. The licensing system was, however, not administered by all the patentees but by American Optical Company, which held only three of the patents, although it held exclusive manufacturing licences under the remaining eight patents. See Appendix I.

The wholesale and retail licences and the schedules issued thereunder controlled prices not only of patented frames and mountings and of complete spectacles embodying them, but also of lenses and of other standard parts used in the spectacles. The broadening of the scope of the patent monopoly in this way is obviously one factor which must be considered in this case in assessing the purpose and effect of the licensing scheme.

Added to these considerations is the fact that the validity of seven patents has been challenged. One has expired, two have been declared invalid and two more await only formal entry of judgment; another two are *sub judice* in the Exchequer Court. The failure of the patentees, including American Optical, to proceed against apparent infringers in the circumstances indicated in sections 13 and 14 of chapter IV and section 7 of chapter VII, suggests that they were unwilling to put the patents to the test of court action. These circumstances must be regarded as relevant in considering the purpose and effect of the restrictive arrangements.

In this case there was a united exercise of the individual patent monopolies in a manner having a cumulative effect quite different in degree and kind from the separate exploitation of individual patents.¹ It is not a case of a simple licensing system under a single patent but rather the joint use of patents as an instrument to control prices and trade generally in almost an entire industry. Extensive as are the rights granted by The Patent Act, it confers no right permitting combination of patentees or of patents in a manner which would reduce or eliminate the competition which would otherwise exist between them. A patentee is thus in the same position as the holder of any other property in respect of action constituting combination. "Patent pools" and cross-licensing arrangements, like other combinations, are not illegal under the Combines Act unless they restrain trade to the detriment of the public. The true nature and character of the arrangements must be examined in each case in order to determine whether they have such effects.

¹ Three United States decisions might be noted in this connection:

" . . . The argument of respondents is that if a patentee may contract with his licensee to fix prices, it is logical to permit any number of patentees to combine their patents and authorize one patentee to fix prices for any number of licensees. In this present agreement Southern and Line have entered into an arrangement by which Line is authorized to and has fixed prices for devices produced under the Lemmon and Schultz patents. It seems to us, however, that such argument fails to take into account the cumulative effect of such multiple agreements in establishing an intention to restrain. The obvious purpose and effect of the agreement was to enable Line to fix prices for the patented devices. Even where the agreements to fix prices are limited to a small number of patentees, we are of the opinion that it crosses the barrier erected by the Sherman Act against restraint of trade though the restraint is by patentees and their licensees" *U.S. v. Line Material Co.*, et al, United States Supreme Court, March 8, 1948, per Reed, J. (opinion of the Court.)

"The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition." *Standard Oil Co. v. U.S.* (1931) 283 U.S., 163 at 175.

"It is unmistakably a combination of manufacturers to restrain competition in the make and sale of their products, with merger of the patents in one ownership as a means employed for that purpose, and thus not entitled to the beneficial rule of the patent law which intends protection only of monopoly of the use of specific invention—not to foster combinations of patentees and manufacturers for general monopoly." *National Harrow Co. v. Hench* (1897) 83 Fed. 36.

The Numont Ful-Vue plan in 1946 affected sale of over 90 per cent of all frames and mountings sold by manufacturers and wholesalers in the Canadian market and over 90 per cent of all optical goods supplied by retailers to consumers. This control of such a considerable part of the industry, the manner in which the plan was introduced, the negotiations and agreements with licensees and prospective licensees, the settlements with recalcitrant dealers, the failure to take action against reported infringers of the patents, and the general manner in which the plan was administered and enforced, lead inescapably to the conclusion that the real purpose of the plan was not the mere legitimate exploitation of patent rights but establishment of a comprehensive scheme of price and trade control.

XIII. CONCLUSION

In this investigation elements of monopoly and combination have been disclosed as dominant factors in the development of trade restraints. The basis of the restrictive arrangements has been seen to exist in the dominant position of one company with its subsidiary in the manufacture of spectacle frames in Canada and in its possession of patent rights which enabled substantial control to be exercised over practically all other manufacturers supplying the Canadian market as well as over wholesale and retail distribution of all but a small part of the goods purchased by consumers. To achieve and maintain this control use has been made of a number of devices, such as the control of prices; control, under restrictive patent licences, of types of goods and channels of distribution; restrictions imposed on low-priced lines; as well as other price agreements.

The extent of this control, the methods employed in making it effective and other restrictive arrangements which have had serious effects on competition in the sale of optical goods in Canada are described in the several chapters of this report. After the description in chapters I and II of the sources of supply of optical goods and the functions of those engaged in their distribution, reference was made in chapter III to the competitive conditions existing among wholesalers prior to 1939 and to the availability of low-priced goods under the active competition then prevailing. Efforts to reduce competition materially at the wholesale level were shown to have been largely abortive until the establishment of control over prices and distribution under the Numont Ful-Vue plan, which was introduced in 1939. Chapter IV outlines at considerable but necessary length the negotiations and action taken to induce all wholesalers and retailers to accept the plan and the manner and extent to which the trade in optical goods was made subject to monopoly control. The bases and ramifications of the plan, the minutiae of schedules and rulings, the vigilant effort of its promoters in administering and enforcing it, as well as the significant failure to proceed actively against reported patent infringers as distinct from violators of the price controls—all these are set forth in chapters V to VIII. Chapter IX describes the concurrent and closely related arrangements intended to fill the principal remaining gaps in the control of competition in the sale of lenses at the manufacturing and wholesale levels by establishing uniform prices and limiting or removing low-priced lines.

The joint effects of the various arrangements in restricting competition and otherwise controlling trade through the wholesalers are elaborated in chapter X, which also deals with representations made by wholesalers in regard to such arrangements. Chapter XI describes conditions in the retail trade in 1947 and reviews the influence of the restrictive arrangements on the level of retail prices and on the conduct of retailers. Charges made to consumers for glasses in 1947 were found in all parts of Canada to vary considerably among different retailers and many charges were at levels considerably above the minimum retail prices fixed under the Numont Ful-Vue plan. Rebating of part of the retail price was found to be a practice in some cases when opticians filled medical prescriptions for glasses. Such a practice was regarded as a symptom of the rigidity of price structures and an indication of the non-competitive conditions in this field which now operate to prevent any direct price reductions to the consumer. In chapter XII consideration was given to the relationship of trade restraints and patent rights and the general application to them of the Combines Investigation Act.

This report has described the manner in which, between 1939 and 1946, competition at all levels of distribution had been reduced in the optical goods trade in Canada. The task remains of reviewing the situation as a whole and, in so doing, of pointing out the principal active elements bringing about this state of affairs, and of assessing the significance of the reduction of competition in the light of the Combines Investigation Act.

The dominant role of American Optical Company and its Canadian subsidiary, Consolidated Optical, in devising and administering the restrictive arrangements, with the assistance of Numont Ful-Vue Corporation and others in the trade, has been apparent in every section of this report. They have succeeded in obtaining and maintaining a position in which they could substantially control the conditions under which optical goods could be sold on the Canadian market. This restriction of competition was especially effective at the manufacturing and wholesale levels and had substantial influence on retail price levels and distribution methods. The foundation of this control has been the substantial control by American Optical of the manufacture of frames and mountings on this continent, the antecedent control of the important Numont and Ful-Vue patents, and the agreements and arrangements by which these controls were made effective. The resulting domination of the Canadian market has not been control in the sense that American Optical and Consolidated Optical themselves carried on all or even most of the manufacturing or wholesaling business. It has been an indirect control which has enabled them, with the assistance of other manufacturers and wholesalers, to lay down the pricing policies to be followed by all other manufacturers and wholesalers serving the Canadian market.

It is quite true that although Consolidated Optical is virtually the sole Canadian manufacturer of frames and mountings, the products of many United States manufacturers are available in Canada. It is also true that Imperial Optical is a larger manufacturer of lenses than is Consolidated Optical and makes more sales to retailers. The basic fact remains, however, that in 1946 over 90 per cent of frames and mountings sold on the Canadian market were made under the Numont Ful-Vue patents and were therefore subject to control by American Optical through its manufacturing licences and other aspects of the Numont Ful-Vue plan. Since a wholesaler had to have frames and mountings of this sort, American Optical was given a powerful lever on the market enabling it and Consolidated Optical to establish controlling policies in the optical goods trade. Such control went far beyond the manufacturing of frames and extended to their wholesale and retail distribution. As shown in chapter IX, it extended even to the manufacturing and wholesaling of principal types of lens. This report has shown how this potential control was actually employed.

American Optical and Numont Ful-Vue Corporation are of course United States companies, and only their activities in Canada or affecting the Canadian market can be of concern in this investigation. Numont Ful-Vue established an office in Canada. American Optical itself did not carry on business in Canada. Its senior officials, however, frequently visited Canada in routine supervision of the operations of Consolidated Optical and to assist in the introduction and administration of the Numont Ful-Vue plan. Other officers also frequently visited Canada in connection with the promulgation of the "American Plan" philosophy discussed in chapter XI. American Optical held and administered several of the key *Canadian* patents and trade marks and controlled the grant of licences under the other *Canadian* patents involved in the Numont Ful-Vue plan. By reason of its direct and detailed control of the policies and actions of Numont Ful-Vue Corporation in Canada and of Consolidated Optical in Canada, it must share responsibility for them.

Prior to 1939 substantial competitive elements existed at the manufacturing, wholesale and retail levels. By the end of 1946 these had to a large degree disappeared. American Optical, through the grouping of the Canadian patents on the vitally important Numont and Ful-Vue types of spectacles, secured and exercised, for the benefit of itself and Consolidated Optical, control of the types of frames and mountings to be manufactured, the prices at which they were to be sold by manufacturers, and the persons permitted to deal in them. The wholesale and retail licences of Numont Ful-Vue Corporation effectively limited competition in the subsequent distribution of these frames and mountings and of the prescription lenses sold with them. At these levels an unusually comprehensive system of resale price maintenance was established embracing the products not only of Consolidated Optical's own manufacture but those of many others.

In most segments of wholesale trade not directly affected by the Numont Ful-Vue plan, Consolidated Optical was not merely a "price leader", acting independently in pricing its goods, but it took an active interest in the prices charged by other wholesalers and took active steps designed to ensure that they substantially observed its prices. In this way, in the wholesale lens market generally, it induced agreement by both manufacturers and wholesalers to remove some lower-priced types of lens from wholesale distribution in Canada and generally to reduce price competition substantially in the sale of lenses. In this task it had the very important assistance of Imperial Optical, the largest lens manufacturer in Canada. With reference to Consolidated Optical's activities generally and with reference to Imperial Optical's activities in the lens market, special significance must be attached to the fact that these companies both manufactured and sold at wholesale to retailers. Thus, in selling to retailers, the manufacturers competed directly with smaller wholesalers whom they supplied and who were therefore subject to their control to a substantial degree.

While this investigation was in progress, the formal nature of the controls in the Canadian market was substantially altered by the modification of the manufacturing and wholesaling licences and the cancellation of the retail licences. The manufacturing and wholesale price controls on the important Numont type of spectacles continued in full force; this type represented over 30 per cent of all spectacles sold in Canada in 1946. The manufacturing and wholesaling licences on the remaining group of standard Ful-Vue products continued to exist, but without specific price control.

Under present market conditions of strong demand for optical goods and the series of arrangements entered into by wholesalers, the removal of formal licence controls to the extent indicated has not resulted in any substantial changes in the competitive situation. Despite the formal change in licensing controls, those responsible for the restrictive arrangements must still assume responsibility for their effects prior to these modifications and for their continuing influence.

Reviewing the situation as a whole it is apparent that the various arrangements in the trade have resulted in very substantial limiting of competition among those directly and indirectly supplying Canadians with spectacleware. The arrangements depended upon the active and aggressive exercise of power secured through grouping of patents, through use of Consolidated's position as the only substantial manufacturer of frames in Canada, and through American Optical's position as the largest manufacturer of optical goods in North America.

The fact that patents have been used to establish the basic structure of the trade controls disclosed in this report should not be permitted to obscure the essential purposes of the restraints, which were to fix prices at all levels of trade and to reduce or remove other elements of competition.

Representations were made on behalf of those involved in the arrangements that there was no proof that the prices fixed were unreasonable. The purpose of a price-fixing arrangement is normally to prevent price competition; such

competition would reveal how prices might be modified or how improvements in manufacturing or distributive techniques or efficiency could be passed on to buyers in the form of lower prices. When prices are fixed on a uniform basis such opportunities disappear.

It has been contended that the restrictive arrangements and policies applying to the trade have been of public advantage in assisting in the advance of Canadian technology and in the expansion of Canadian manufacture and export of optical goods. It is claimed that while the arrangements have been in effect, quality has been improved and standards of service to the public generally raised. Advances of this character would be of advantage in a field so closely affecting health and welfare, and the development of trade may benefit the country in general as well as those who participate directly. But it cannot be taken that such improvements were necessarily brought about by restrictive arrangements or that they could not have been secured without them. Apt expression was given to similar considerations in a recent American decision:

"Nor does it necessarily follow that the advance of the art, the rise in production and the decline of prices are attributable to the effects of the combination. Post hoc, propter hoc, is an invalid argument whether used by the plaintiff or the defendant. Anyone is free to speculate whether, in the absence of the arrangement, the stimulus of competition might not have produced far greater strides in these beneficial directions. The economic theory underlying the Sherman Act is that, in the long run, competition is a more effective prod to production and a more trustworthy regulator of prices than even an enlightened combination."¹

The prime question must be, therefore, not whether advances have been made in the industry or what have been the effects of the arrangements on particular prices, but whether, as Mr. Justice Anglin put it in *Weidman v. Shragge*, the arrangements "impose improper, inordinate, excessive or oppressive restrictions upon that competition the benefit of which is the right of every one"². Mr. Justice Duff stated it in the same case when he declared the basic test to be whether the agreement had for one of its "direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing competition in that trade"³.

This principle is confirmed in every important recent decision in Canadian courts and in particular by Chief Justice Duff in 1942 in his judgment in the *Container Materials* case:

"The enactment before us, I have no doubt, was passed for the protection of the specific public interest in free competition. That, in effect, I think, is the view expressed in *Weidman v. Shragge* in the judgments of the learned Chief Justice, of Mr. Justice Idington and Mr. Justice Anglin, as well as by myself. This protection is afforded by stamping with illegality agreements which, when carried into effect, prevent or lessen competition unduly and making such agreements punishable offences; and, as the enactment is aimed at protecting the public interest in free competition, it is from that point of view that the question must be considered whether or not the prevention or lessening agreed upon will be undue."⁴

Applying these principles to this case, and having regard to how they have been applied in the twenty odd decisions of Canadian courts in criminal cases under the Combines Investigation Act and section 498 of the Criminal Code, and in the numerous other cases in which the principles have been considered, one must conclude, looking at the arrangements as a whole, that what was intended and what was to a large degree accomplished was a very substantial and, in some aspects virtually complete, lessening of price competition that must be considered detrimental to the public. What is here involved is no mere indirect, incidental or minor restriction on competition, but a very substantial interference with the "public interest in free competition".

¹*U.S. v. National Lead Co.*, (1945) 63 F. Supp. 513 at p. 525.

²Anglin, J., in *Weidman v. Shragge*, (1912) 46 S.C.R. 1 at pp. 42-43.

³Duff, J., in *Weidman v. Shragge*, *supra*, at p. 37.

⁴Duff, C.J.C., in *Container Materials Ltd. et al. v. The King*, (1942) 77 C.C.C. 129 at p. 134.

Primary emphasis has had to be given in this inquiry to the position of American Optical and Consolidated Optical in the Canadian market. The lessening of competition to the degree disclosed in this report cannot, however, be attributed solely to these companies. Chapter XI has shown that, although the programs they sponsored contributed very materially to the lessening of price competition at the retail level, other factors also played an important part. At the wholesale and manufacturing levels, their influence has been vital; they devised and administered the Numont Ful-Vue plan, and, in connection with it and the lens arrangements, promoted other combinations with wholesalers who were induced, often under heavy pressure, to assist them in achieving their basic objectives. At the same time other wholesalers participated, with varying degrees of enthusiasm, in some or all phases of the various combinations. The small wholesalers generally lent their support. Bausch & Lomb undoubtedly strongly favoured the Numont Ful-Vue plan and participated fully in it. Imperial Optical, the largest wholesaler, although a reluctant entrant into the plan, became one of its strongest supporters. In particular, Imperial Optical, as a principal beneficiary of the lens arrangements, assisted in devising and enforcing many of them.

Section 13 of the Inquiries Act provides:

"No report shall be made against any person until reasonable notice shall have been given to him of the charge of misconduct alleged against him and he shall have been allowed full opportunity to be heard in person or by counsel."

Such notice and such opportunity have been given to those referred to in the last two paragraphs of this report. Such notice and opportunity have not been given to United States manufacturers or to retailers in Canada to whose activities general reference has been made in this report. With respect to them no findings are made.

After reviewing carefully all the evidence, including the representations of the parties involved, it is my opinion, for the reasons set forth in this report, that several combines within the meaning of the Combines Investigation Act have existed in the distribution and sale of optical goods in Canada and, in particular,

(a) That Consolidated Optical Company Limited, of Toronto, Ontario, now known as American Optical Company Canada Limited, and American Optical Company, of Southbridge, Mass., U.S.A., have substantially controlled the optical goods trade throughout Canada and have operated and are likely to operate to the detriment and against the interest of the public, and that they are therefore a combine within the meaning of the said Act; and

(b) That American Optical Company, of Southbridge, Mass., Numont Ful-Vue Corporation, of Southbridge, Mass., and Toronto, Ontario, and all the twenty-six Canadian wholesalers named in chapter II of this report have been party to or privy to or have knowingly assisted in the formation and operation of combinations which have operated and are likely to operate to the detriment and against the interest of the public and that such combinations are combines within the meaning of the said Act.

F. A. MCGREGOR

Commissioner, Combines Investigation Act.

Ottawa,
April 24, 1948.

APPENDIX I.

PATENTS AND TRADE MARKS

1. Patents listed in Numont Ful-Vue wholesale and retail licences or amendments thereto.

Patent No.	Issue Date	Common Name	Holder of Patent	Feature Claimed
(a) <i>Ful-Vue type</i> 296,512	January 7, 1930...	Emons (Ful-Vue).	Ful-Vue Sales Com- pany, Washington, D.C.	Ful-Vue high mounting feature.
316,329	October 20, 1931..	Emons (Ful-Vue).	Ful-Vue Sales Com- pany.	Ful-Vue feature applied to certain mountings.
360,996	October 6, 1936...	Emons (Ful-Vue).	Ful-Vue Sales Com- pany.	Ful-vue feature combin- ed with nose guards.
331,430	April 4, 1933.....	McLeod (Ful-Vue)	American Optical Company, South- bridge, Mass.	Ful-Vue feature with various positions of bridge.
(b) <i>Numont type</i> 381,380	May 16, 1939.....	Uhlemann (Nu- mont).	Uhlemann Optical Company, Chicago, Ill.	First Numont patent.
392,499	November 19, 1940	Uhlemann (Nu- mont)	Uhlemann Optical Company	Numont feature applied to different lenses.
Industrial Design No. 58/12138	November 3, 1938.	Uhlemann (Nu- mont).	Uhlemann Optical Company.	Numont Design.
357,755	May 12, 1936.....	Gagnon-Styll- Cozzens.	American Optical Company.	Claimed as basis for Arcway, Rimway and Toprim types of semi- rimless.
(c) <i>Others</i> 333,957	July 11, 1933.....	Jacobson (DiaFlex).	Martin-Copeland Com- pany, Providence, R.I.	Double spring strap.
364,933	March 23, 1937....	Splaine (TriFlex and Duflex).	American Optical Company.	Triple spring straps.
398,311	July 29, 1941.....	Camloc.....	Martin-Copeland Com- pany.	Type of rivet.

The following points should be noted:

- (1) Patent No. 296,512 was a re-issue of Patent No. 274,841 dated October 25, 1927, and accordingly expired on October 25, 1945. All other listed patents issued prior to 1935 expire eighteen years after issuance and later patents, except the design patent, expire seventeen years after issuance.
- (2) All Numont and Ful-Vue type patents except No. 357,755 were challenged in the Exchequer Court by the Attorney General of Canada. Some of them have been declared invalid and the rest are still before the Court. See section 2 of Chapter VIII.
- (3) Three of the patents were issued after the introduction of the Numont Ful-Vue plan; the first licences thus were under patent applications.

Patent No.	Patent Date	Application No.	Application Date
381,380	May 16, 1939	450,283	March 5, 1938
392,499	November 19, 1940	457,499	November 5, 1938
398,311	July 29, 1941	464,641	June 17, 1939

2. Trade Marks listed in licences or amendments thereto.

Name	Date of Registration	Registration No.	Name of Holder
Ful-Vue.....	December 31, 1930.....	237/51221	American Optical Company (assigned to it by Ful-Vue Sales Company).
Numont.....	March 27, 1939.....	N.S.46/12317	Uhlemann Optical Company.
Camloc.....	June 8, 1939.....	N.S.49/13111	Martin-Copeland Company.

APPENDIX II.

LIST OF MANUFACTURING LICENSEES

The manufacturers listed below were licensed by American Optical Company under Canadian patents to manufacture and sell to Canadian wholesalers and retailers the respective patented goods indicated. Only two Canadian companies are listed—Imperial Optical Company with reference to Ful-Vue rimless mountings, and Consolidated Optical Company Limited (now American Optical Company Canada Limited) with reference to all goods except Arcway and Toprim mountings. American Optical itself manufactured all goods except Arcway and Toprim. This list shows manufacturers as of February 24, 1941, and was adapted from Sheet No. 10 of Schedule B of the Canadian Numont Ful-Vue retail licence and Sheet No. 61 of Schedule A of the wholesale licence:

Numont Mountings

Bausch & Lomb Optical Company, Rochester, N.Y.
Bay State Optical Company, Attleboro, Mass.
Consolidated Optical Company Limited, Toronto, Ontario.
Continental Optical Company, Indianapolis, Ind.
Martin-Copeland Company, Providence, R.I.
May Mfg. Co., Inc., New York, N.Y.
New Jersey Optical Company, Irvington, N.J.
Shuron Optical Company, Geneva, N.Y.

Arcway Mountings

Art-Craft Optical Co., Inc., Rochester, N.Y.
Bishop Company, The, North Attleboro, Mass.
Century Oxford Mfg. Corp., Long Island City, N.Y.
Dupaul-Central Optical Company, Southbridge, Mass.
J. Gaspari & Co., Inc., New York, N.Y.
Lowres Optical Mfg. Co., Inc., Newark 5, N.J.
T. & P. Optical Mfg. Co., Inc., New York, N.Y.
United Optical Company, Webster, Mass.
Universal Optical Corporation, Providence, R.I.

Toprim Mountings

Art-Craft Optical Co., Inc., Rochester, N.Y.
Bausch & Lomb Optical Company, Rochester, N.Y.
Bishop Company, The, North Attleboro, Mass.
Century Oxford Mfg. Company, Long Island City, N.Y.
J. Gaspari & Co., Inc., New York, N.Y.
Martin-Copeland Company, Providence, R.I.
Shuron Optical Company, Geneva, N.Y.
T. & P. Optical Mfg. Co., Inc., New York, N.Y.

Rimway Mountings

Art-Craft Optical Co., Inc., Rochester, N.Y.
Bausch & Lomb Optical Company, Rochester, N.Y.
Bay State Optical Company, Attleboro, Mass.
Consolidated Optical Company Limited, Toronto, Ontario.
Lowres Optical Company, Newark, N.J.
Martin-Copeland Company, Providence, R.I.
New Jersey Optical Co., Irvington, N.J.
Shuron Optical Company, Geneva, N.Y.
T. & P. Optical Mfg. Co. Inc., New York, N.Y.
Universal Optical Corporation, Providence, R.I.

Ful-Vue Metal Frames

Art-Craft Optical Co., Inc., Rochester, N.Y.
 Bausch & Lomb Optical Company, Rochester, N.Y.
 Bay State Optical Company, Attleboro, Mass.
 Bishop Company, The, North Attleboro, Mass.
 Century Oxford Mfg. Corp., Long Island City, N.Y.
 Consolidated Optical Company Limited, Toronto, Ontario.
 Continental Optical Company, Indianapolis, Ind.
 Dupaul-Central Optical Company, Southbridge, Mass.
 J. Gaspari & Co., Inc., New York, N.Y.
 Frank Krementz Company, Newark, N.J.
 Lowres Optical Mfg. Co., Inc., Newark, N.J.
 Martin-Copeland Company, Providence, R.I.
 May Mfg. Co., Inc., New York, N.Y.
 New Jersey Optical Company, Irvington, N.J.
 Shuron Optical Co., Inc., Geneva, N.Y.
 T. & P. Optical Mfg. Co., Inc., New York, N.Y.
 United Optical Company, Webster, Mass.
 Universal Optical Corp., Providence, R.I.

Ful-Vue Rimless Mountings

Art-Craft Optical Co., Inc., Rochester, N.Y.
 Bausch & Lomb Optical Company, Rochester, N.Y.
 Bay State Optical Company, Attleboro, Mass.
 Bishop Company, The, North Attleboro, Mass.
 Century Oxford Mfg. Corp., Long Island City, N.Y.
 Consolidated Optical Company Limited, Toronto, Ontario.
 Continental Optical Company, Indianapolis, Ind.
 Dupaul-Central Optical Company, Southbridge, Mass.
 J. Gaspari & Co. Inc., New York, N.Y.
 Imperial Optical Company, Toronto, Ontario.
 Frank Krementz Company, Newark, N.J.
 Lowres Optical Mfg. Co., Inc., Newark, N.J.
 Martin-Copeland Company, Providence, R.I.
 May Mfg. Co., Inc., New York, N.Y.
 New Jersey Optical Company, Irvington, N.J.
 Shuron Optical Co., Inc., Geneva, N.Y.
 T. & P. Optical Mfg. Co. Inc., New York, N.Y.
 United Optical Company, Webster, Mass.
 Universal Optical Corp., Providence, R.I.

Ful-Vue Zylonite Frames

Bausch & Lomb Optical Company, Rochester, N.Y.
 Bay State Optical Company, Attleboro, Mass.
 Century Oxford Mfg. Corp., Long Island City, N.Y.
 Consolidated Optical Company Limited, Toronto, Ontario.
 J. Gaspari & Co., Inc., New York, N.Y.
 Kono Mfg. Co., The, Woodside, N.Y.
 Lorgnettes, Inc., Providence, R.I.
 Marine Optical Mfg. Corp., Roslindale Sta., Boston, Mass.
 May Mfg. Co., Inc., New York, N.Y.
 Newport Optical Mfg. Co., Inc., Brooklyn, N.Y.
 Optical Products Corp., New York, N.Y.
 Schoemig & Bava, New York, N.Y.
 Shell-Craft Mfg. Corp., New York, N.Y.
 Shuron Optical Co., Inc., Geneva, N.Y.
 K. Stenzel & Sons Inc., New York, N.Y.
 T. & P. Optical Mfg. Co. Inc., New York, N.Y.
 Teller Optical Company, The, Providence, R.I.
 Tru-Vue Optical Co. Inc., New York, N.Y.
 Universal Optical Corp., Providence, R.I.
 Ward Mfg. Co., Inc., North Arlington, N.J.
 Zylo Ware Corp., Long Island City, N.Y.

Zyl-Arc Frames

Bay State Optical Company, Attleboro, Mass.
 Consolidated Optical Company Limited, Toronto, Ontario.
 Lorgnettes, Inc., Providence, R.I.
 Optical Products Corp., New York, N.Y.
 Shuron Optical Co., Inc., Geneva, N.Y.

Tri-Flex Mountings

Bay State Optical Company, Attleboro, Mass.
 Consolidated Optical Company Limited, Toronto, Ontario.

Dia-Flex Type Spring Strap Mountings

Art-Craft Optical Co., Inc., Rochester, N.Y.
 Bay State Optical Company, Attleboro, Mass.
 Consolidated Optical Company Limited, Toronto, Ontario.
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